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In The
Supreme Court of the United States

STATE OF CONNECTICUT and
GENERAL ASSEMBLY OF THE
STATE OF CONNECTICUT,

Petitioners,

v.

ARNE DUNCAN, in his official capacity as Secretary of the United States Department of Education, and CONNECTICUT STATE CONFERENCE OF THE NAACP, INDIVIDUAL MINORITY PARENTS AND STUDENTS IN CT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the doctrine of prudential ripeness can bar a State from obtaining a timely judicial determination of its obligations under Spending Clause legislation, where the federal government's legal interpretation of the State's obligations under that legislation is clear and imposes a hardship on the State?

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PETITION FOR A WRIT OF CERTIORARI

The State of Connecticut and the General Assembly of the State of Connecticut respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App., *infra*, 1-23) is reported at 612 F.3d 107. The relevant opinions of the district court are reported at 549 F. Supp. 2d 161 (App., *infra*, 24-70) and 453 F. Supp. 2d 459 (App., *infra*, 71-166).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 13, 2010. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Article I, Section 8, Clause 1 of the United States Constitution, known as the Spending Clause, provides, in relevant part, that: "The Congress shall

have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ."

Section 9527 of the No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002) ("the NCLBA"), codified at 20 U.S.C. § 7907, provides that:

> **SEC. 9527. PROHIBITIONS ON FEDERAL GOVERNMENT AND USE OF FEDERAL FUNDS.**
>
> (a) GENERAL PROHIBITION. – Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.
>
> (b) PROHIBITION ON ENDORSEMENT OF CURRICULUM. – Notwithstanding any other prohibition of Federal law, no funds provided to the Department under this Act may be used by the Department to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school.
>
> (c) PROHIBITION ON REQUIRING FEDERAL APPROVAL OR CERTIFICATION OF STANDARDS. –

(1) IN GENERAL. – Notwithstanding any other provision of Federal law, no State shall be required to have academic content or student academic achievement standards approved or certified by the Federal Government, in order to receive assistance under this Act.

(2) RULE OF CONSTRUCTION. – Nothing in this subsection shall be construed to affect requirements under title I or part A of title VI.

(d) RULE OF CONSTRUCTION ON BUILDING STANDARDS. – Nothing in this Act shall be construed to mandate national school building standards for a State, local educational agency, or school.

STATEMENT OF THE CASE

Five years ago, the State of Connecticut ("the State") was faced with a dilemma. Although the NCLBA's Unfunded Mandates Provision seemed to make clear that the State could not be forced to expend state funds to comply with federal NCLBA mandates and a former United States Secretary of Education publicly interpreted the statutory language the same way, the then-Secretary of Education took the position that she could force the State to spend its own funds on federal mandates, even where the State's educational experts believed those mandates were unnecessary and counterproductive.

Once it became clear that the Secretary would not change her position, the State filed suit seeking judicial guidance as to whose interpretation of the legislation – the State's or the Secretary's – was correct. The State hoped that a neutral federal judge would be able to resolve the straightforward, but critically important, legal question quickly so the parties could go forward with a clear understanding of their obligations under the NCLBA, which – as Spending Clause legislation – is effectively a contract.

It did not work out that way. After five years of litigation, the State is no closer to an answer. Instead of resolving the straightforward legal question, the district court and the Second Circuit concluded, on prudential ripeness grounds, that before the State can get a neutral judge to look at the issue, it has to initiate another set of administrative proceedings controlled by the Secretary – the opposing party to the Spending Clause "contract" – that everyone knows can only result in a ruling against the State given the Secretary's well-known and unwavering (at least since Secretary Paige's term[1]) legal position.

The absurdity of that result is best demonstrated by comparing it with a suit raising the same issue filed in Michigan in 2005 by school districts. Neither the Secretary nor the court initially expressed any

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[1] Both Secretary Spellings, the original defendant in this suit, and current Secretary Duncan have consistently maintained the position that the Unfunded Mandates Provision does not prevent them from forcing states to spend their own funds on NCLBA federal mandates.

concern about ripeness in that case, and the parties had the district court's answer on the merits (albeit not the one the plaintiffs wanted) within seven months.

Eventually, the *en banc* Sixth Circuit took the case and asked for briefing on the ripeness question. Thirteen of the sixteen judges concluded that the school districts' claims were ripe, even though the Secretary claimed at oral argument that the case was less ripe than Connecticut's.

There is no reason in law or logic why school districts in Michigan should be able to get the courts' view on a straightforward and important legal question regarding Spending Clause legislation while the State cannot. This Court should grant this petition, reverse the Second Circuit's decision, and allow the State to get an answer on the merits without more costly delay.

I. THE NO CHILD LEFT BEHIND ACT

Education historically was exclusively the realm of the States. *See, e.g.*, *Horne v. Flores*, ___ U.S. ___, 129 S. Ct. 2579, 2593 (2009) (recognizing that public education is a "core state responsibility"). As this Court has repeatedly recognized, education is "perhaps the most important function of state and local governments," *Honig v. Doe*, 484 U.S. 305, 309 (1988) (*quoting Brown v. Board of Education*, 347 U.S. 483, 493 (1954)), and it is generally committed to state and local control. *Board of Curators v. Horowitz*, 435 U.S. 78, 91 (1978); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Connecticut's historic commitment to

education is reflected in the fact that, although the federal constitution does not enumerate educational rights, the Connecticut Constitution grants children a free public elementary and secondary education, and directs the state legislature to "implement this principle by appropriate legislation." Conn. Const. Art. Eighth.

The federal government began to reach into the educational sphere with the enactment of the Elementary and Secondary Education Act of 1965 ("the ESEA"), Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 2701 *et seq.*). It greatly expanded that reach with the enactment of the No Child Left Behind Act of 2001 ("the NCLBA"), which is the most recent iteration of the ESEA and provides for unprecedented federal involvement in, and oversight of, education at the state and local level.

The NCLBA reflects an agreement between the states and the federal government whereby the states agree to permit federal involvement in state and local education in exchange for federal funding. The conditions associated with that funding are onerous and extensive, reaching all aspects of the educational process.

For example, the NCLBA requires states to establish "challenging" standards for "academic content" and "student achievement." 20 U.S.C. § 6311(b)(1)(A), (D). They must also develop a state-wide testing regime, which requires the administration of seventeen different standardized tests – each of which must comply with detailed statutory criteria – to students of various grades. 20 U.S.C. § 6311(b)(3)(C)(i)-(xv).

They must then use those tests to grade the performance of all schools in the state based on the data obtained, and publicly report whether those schools have made "adequate yearly progress." 20 U.S.C. § 6311(b)(2), (h)(1)-(2), § 6316(a)(1)(A)-(B). Finally, if a school does not make "adequate yearly progress," the state is required to take action against the school but, instead of having discretion as to the appropriate action, the state must choose one of several statutory options. Those options include permitting all students to transfer out of the school, replacing the staff, converting the school into a charter school, or hiring a private company to run the school. 20 U.S.C. § 6316(b)(7).

Given the invasive and costly nature of the federal conditions imposed pursuant to the NCLBA, the issue of funding was critical to the State's agreement to accept federal funds.

The most fundamental provision of the NCLBA addressing the funding issue – and the one directly at issue in this case – is § 9527(a) (codified as 20 U.S.C. § 7907) ("the Unfunded Mandates Provision"), which provides that:

> (a) GENERAL PROHIBITION. – Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of

> State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

Based on the Unfunded Mandates Provision, soon after the NCLBA's enactment, then-Secretary Rod Paige publicly "stated that the Act 'contains language that says *things that are not funded are not required*.'" *Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ.*, 512 F.3d 252, 272 (6th Cir.), *vacated by*, 2008 U.S. App. LEXIS 12121 (6th Cir. 2008) (quoting Paige statement of September 4, 2003) (emphasis added in decision)). Then-Secretary Paige "[r]eiterat[ed] this point in a later speech, . . . reassur[ing] that 'if it's not funded, it's not required. There is language in the bill that *prohibits requiring anything that is not paid for*.'" *Id.* (quoting Paige statement of December 2, 2003) (emphasis added in decision)). The Secretary has since taken – and consistently maintained – the position that, contrary to then-Secretary Paige's public comments soon after the NCLBA's enactment, the Unfunded Mandates Provision poses no impediment to requiring states to expend state funds on federal mandates.

II. THE PROCEEDINGS IN DISTRICT COURT

In accordance with the NCLBA, Connecticut submitted a plan to the Secretary, which the Secretary approved in June 2003. At about the same time –

consistent with Connecticut's understanding of the plain meaning of the Unfunded Mandates Provision – the Connecticut General Assembly amended the State's testing statutes to comply with the NCLBA, expressly providing that all costs attributable to the additional federal requirements shall "be paid exclusively from federal funds." Conn. Gen. Stat. § 10-14n(g) (2006) (App. 169).

It soon became evident, however, that – notwithstanding the Unfunded Mandates Provision – the federal funding was insufficient to pay for the requirements the NCLBA imposed on Connecticut. For example, studies commissioned by the Connecticut General Assembly concluded that, from fiscal year 2003 through fiscal year 2008, there would be a $41.6 million gap in federal funding at the State level and a gap of hundreds of millions of dollars at the local level.

In light of the substantial gap between the cost of the federal NCLBA mandates and the funds the federal government provided to pay for them, the State asked the Secretary to waive certain NCLBA requirements that the State's educational experts believed – based on scientific research and decades of experience – were unnecessary or, in some cases, counterproductive. The State also proposed plan amendments that were supported by experience

and scientific research, and that would have substantially reduced the cost to the State.

The Secretary ultimately refused to grant the State's waiver requests and plan amendments. Throughout the administrative process, the Secretary maintained the position that the Unfunded Mandates Provision imposed no obstacle to requiring the State to pay state funds to comply with the NCLBA's mandates. That position has remained unwavering throughout this litigation and other litigation challenging the Secretary's actions in connection with the NCLBA.

Faced with the Secretary's imposition of unfunded mandates in direct contravention of the NCLBA's clear text and the State's understanding of its obligations under the statute (confirmed by then-Secretary Paige's public comments), the State brought suit in August 2005 and later amended its Complaint to allege four claims: (1) a claim seeking a declaratory judgment that the Unfunded Mandates Provision of the NCLBA means that the State cannot be required to spend any of its funds or incur any costs that are not federally funded to comply with the NCLBA's mandates; (2) a claim that, to the extent the Secretary's interpretation of the NCLBA was correct, a state official would not clearly understand that the NCLBA required the state to expend state funds to comply with federal mandates, and the Secretary's application of the NCLBA therefore violates the Spending Clause and the Tenth Amendment; (3) a claim under the Administrative Procedures Act

("APA") alleging that the Secretary's denial of the State's waiver requests based on the lack of federal funding was contrary to law; and (4) an APA claim alleging that the Secretary improperly denied the State's plan amendments without providing the State an opportunity to revise its amendments, technical support or a hearing, and that the denial of the amendments was contrary to law.

The Secretary moved to dismiss the State's amended Complaint, and the district court granted the Secretary's motion in part. The district court began its decision by acknowledging that "the State and the Secretary have fundamental, important, and bona fide disagreements about the interpretation and implementation of the Act," but proceeded to hold that it lacked jurisdiction to resolve those disagreements. App. 72. Specifically, the district court rejected the Secretary's argument that the State lacked standing, holding that the State's allegation "that the *current* federal funds it receives under the Act fail to cover the costs of administering the tests required by the Act" established that the State was suffering an "immediate injury" sufficient to find standing. App. 113-14 (emphasis in the original).

Although the district court found that the State had properly alleged that the Secretary's interpretation of the NCLBA was causing the state "immediate injury," the district court went on to conclude that the State's efforts to obtain prompt judicial review of that

interpretation were not prudentially ripe.[2] In so holding, the district court acknowledged that the State's claims "entail[ ] statutory construction issues, and thus legal issues that are ordinarily fit for judicial determination," but concluded that the State should nonetheless be required to submit a new plan amendment request[3] reflecting its view of its obligations as informed by its position on the Unfunded Mandates Provision, which – in the district court's view – could somehow obviate the need for court involvement. App. 134. In the district court's view, despite the State's claims of "immediate injury," withholding judicial review of the Secretary's interpretation of the NCLBA would not impose a

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[2] The district court also held that this Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), established that the federal courts lack jurisdiction over the State's pre-enforcement challenge to the Secretary's interpretation of the NCLBA. The State vigorously challenged that part of the district court's holding on appeal and the Secretary did not defend the district court's decision on that ground. The Second Circuit did not address the issue because it affirmed the district court on prudential ripeness grounds. App. 9.

[3] It is important to note that at the time of the district court's ruling, there was no administrative request pending before the Secretary. She had denied the State's waiver requests on February 28, 2005 and denied the State's updated plan amendment request and waiver request on June 20, 2005. Thus, although the district court talked of supplementing the administrative record, the Secretary had already denied State's pending requests. *See, e.g.*, App. 109, 165 (noting that "the Secretary's third and final denial of the State's requests . . . came in June 2005" and that "there apparently are no other plan amendments pending before the Secretary").

hardship on the State because "[t]he State remains in compliance with the Act and therefore faces no imminent enforcement action by the Secretary." App. 137. Thus, the district court granted the Secretary's motion to dismiss as to Counts I and II of the State's amended Complaint.

As to Count IV[4] of the State's amended Complaint, alleging that the Secretary's denial of the State's plan amendments violated the APA, the district court denied the Secretary's motion to dismiss as premature but concluded that the State's claim that the Secretary was required to provide a hearing before denying the plan amendments was moot, based on its understanding of the State's position. App. 163-65. The State subsequently sought to clarify its position in connection with Cross-Motions for Judgment on the Administrative Record, but the district court again declined to reach the hearing issue and ultimately granted the Secretary's motion and entered judgment in his favor. App. 42-47. The State appealed.

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[4] Count III of the State's amended Complaint challenged the Secretary's denial of the State's waiver requests. The district court granted the Secretary's motion to dismiss that count, holding that the Secretary's denial of a waiver request was not subject to review by the courts. App. 145-61. The State did not challenge that aspect of the district court's decision on appeal.

III. THE PROCEEDINGS IN THE SECOND CIRCUIT

The Second Circuit correctly recognized that "[t]he crux of the State's lawsuit boils down to one core allegation: the Unfunded Mandates Provision of the NCLBA requires the State to be funded the full amount of any costs required to comply with the Act, but the State is nevertheless currently paying more to comply than it is receiving in Title I educational grants." App. 7. The court also correctly recognized that "the State is correct that the Secretary's interpretation of the Unfunded Mandates Provision is clear and that the parties have a concrete dispute about its meaning and constitutionality" and that the parties had fully briefed the issue on appeal. App. 8, 13. It nonetheless substantially affirmed the district court's holding that the State's claims were not prudentially ripe and did not address the merits of the State's claims.

In so holding, the Second Circuit acknowledged that its conclusion that the State's claims were not prudentially ripe was directly contrary to an *en banc* Sixth Circuit decision involving a similar challenge to the Secretary's interpretation of the NCLBA's Unfunded Mandates Provision. App. 15 n.4 (citing *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253 (6th Cir. 2009) (*en banc*), *cert. denied*, 130 S. Ct. 3385 (2010)). It also acknowledged that "'[e]ven if resolution of a dispute could be facilitated if a court waited for a specific application of the

issues in contention, the question may, nonetheless, perhaps be justiciable'" if a "sufficiently weighty" hardship would result from delaying judicial review. App. 15 (quoting *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 226 (2d Cir. 1998)). However, the court concluded that "the only potential material hardship to Connecticut is any state funds it must continue to expend on compliance" and that the loss of those funds – which the State alleged amounted to millions of dollars that could not be recovered – was not a sufficient hardship to warrant timely judicial review. App. 16. In the Second Circuit's view, five years after the State filed suit seeking only judicial review of the Secretary's unwavering position on this important and straightforward legal issue, initiating "further administrative proceedings may be the most effective way to save the State this money." App. 16.

Although the Second Circuit agreed with the district court that the State's claims were not prudentially ripe, it did conclude that "the State has a strong argument that it was entitled to a hearing on its plan amendments" and that the district court incorrectly concluded that the State had abandoned its request for a hearing. App. 17-23. The Second Circuit nevertheless declined to even resolve that issue. App. 23. Thus, the Second Circuit left the State to re-start the administrative process anew five years after this litigation commenced without any definitive guidance on either the meaning of the Unfunded Mandates Provision or whether, in fact, the Secretary would

even be required to provide the State a hearing on any plan amendment it filed.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CLEAR SPLIT AMONG THE CIRCUITS ON WHETHER PURELY LEGAL QUESTIONS INVOLVING THE SCOPE OF AGENCY AUTHORITY ARE PRESUMPTIVELY RIPE FOR JUDICIAL REVIEW

This case is emblematic of a larger split among the circuits on whether a purely legal question involving an agency's interpretation of a statute it enforces is presumptively ripe for judicial review. Facing similar challenges to the Secretary's interpretation of the NCLBA's Unfunded Mandates Provision, both the Second Circuit and the Sixth Circuit correctly recognized "that the Secretary's interpretation of the Unfunded Mandates Provision is clear and that the parties have a concrete dispute about its meaning and constitutionality." App. 13; *see also Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ.*, 584 F.3d 253, 279 (6th Cir. 2009) (*en banc*), *cert. denied*, 130 S. Ct. 3385 (2010) (Sutton, J., concurring) ("Because this dispute raises an unvarnished question of law that will not benefit from further factual development, it presumptively is ripe for review." (citing *Dixie Fuel Co. v. Comm'r of Social Sec.*, 171 F.3d 1052, 1058 (6th Cir. 1999), *overruled on other grounds by Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157 (2003)). They reached the opposite conclusions on the question of

ripeness, however, because the Second Circuit applied no presumption in favor of judicial review of legal questions, while the Sixth Circuit did.

In so holding, the Second and Sixth Circuits highlighted a divide among the circuits on whether courts should presume that they have authority to provide timely judicial guidance where there are challenges to an agency's interpretation of a statute it administers or whether impacted entities should be forced to submit to administrative proceedings premised on the correctness of the agency's legal interpretation before a court can address the purely legal issue raised. This issue is critical to the proper application of the ripeness analysis this Court promulgated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and that lower courts have applied thousands of times since.

In *Abbott Labs.*, this Court established that determining whether administrative action is ripe for judicial review requires a court to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Id.* at 149. Although the application of the *Abbot Labs.* test requires balancing of those factors, the first is "the more important" and the second "is less clear and less important." *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 814 (2003) (Stevens, J., concurring).

Consistent with the primacy of the fitness inquiry, the D.C. Circuit "has long understood the

approach in *Abbott Labs.* to incorporate a presumption of reviewability" where legal questions are raised, *Sabre, Inc. v. DOT*, 429 F.3d 1113, 1119 (D.C. Cir. 2005), and the Fifth and Sixth Circuits have likewise recognized an explicit presumption. *See, e.g.*, *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring); *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 32 (2008) ("[a] case is generally ripe if any remaining questions are purely legal ones."). As the D.C. Circuit has recognized, "[c]ourts confronted with close questions of ripeness are appropriately guided by the presumption of reviewability, especially when the affected person is confronted with the dilemma of choosing between disadvantageous compliance or risking imposition of serious penalties." *Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986).

The express presumption in favor of providing timely judicial review of legal questions recognized by those circuits is consistent with the hierarchy of *Abbot Labs.* factors and is critical to proper application of the analysis. A comparison of the Sixth Circuit's decision in *School Dist. of Pontiac* with the Second Circuit's decision in this case illustrates why.

Both courts recognized that the issues presented were legal. Based on that premise, the Sixth Circuit concluded that the claims were "presumptively . . . ripe for review." *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring). It then concluded that "[w]hile further administrative proceedings might sharpen the nature of some of the school districts' claims," *id.*,

requiring them to submit to additional administrative proceedings – the result of which would be a foregone conclusion given the Secretary's settled interpretation of the Unfunded Mandates Provision – would impose a hardship sufficient to support a ripeness finding because "unless we decide this matter, school district Plaintiffs will be forced to continue expending limited state resources to comply with NCLB." *Id.* at 263 (opinion of Cole, J.).[5]

By contrast, the Second Circuit recognized that the "crux of the State's lawsuit boils down to one core allegation," whether, as a matter of statutory construction, "the Unfunded Mandates Provision of the NCLBA requires the State to be funded the full amount of any costs required to comply with the Act." App. 7. However, it did not apply the presumption of reviewability and that led it to incorrectly conclude – directly contrary to the Sixth Circuit – that the hardship to the State resulting from delayed judicial review of this purely legal question was insufficient to establish ripeness.

That was clearly wrong. The Secretary's incorrect interpretation of the NCLBA put the State in the position where it was forced to either comply with the

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[5] Although Judge Cole's opinion did not expressly refer to the presumption in favor of judicial review, Judge Sutton's concurring opinion did – citing a prior Sixth Circuit decision – and it appears clear that both opinions applied the presumption, either explicitly or implicitly. *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring).

Secretary's unlawful mandates or risk the loss of hundreds of millions of dollars in much-needed education funding. Unwilling to gamble on the educations of its children, the State took the only responsible course and complied with the Secretary's unlawful demands and "eliminated the imminent threat of harm by simply not doing what [it] claimed the right to do," namely, spend its own state education funds as its experts saw fit based on the science and decades of experience. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

Contrary to the Second Circuit's decision, the State's decision to comply with the Secretary's unlawful dictates "did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced." *Id.* at 129. The Second Circuit was dismissive of the hardship resulting from the State's forced compliance, claiming that the State could eventually receive judicial review after initiating another set of administrative proceedings before the Secretary – the outcome of which would have been preordained – and that the resulting "delay *itself* is not the cause of any constitutional infringement that cannot otherwise be addressed in due course." App. 17 n.5 (emphasis in original). However, that conclusion is inconsistent with the facts and this Court's precedent.

Every day the State has been forced to wait for judicial review of the Secretary's incorrect interpretation of the NCLBA is a day that it has been "forced to continue expending limited state resources to comply

with NCLB." *Sch. Dist. of Pontiac*, 584 F.3d at 263. That has resulted in millions of dollars of additional costs to the State and its citizens that they can ill-afford. That is a clear hardship. As this Court recently recognized in an analogous context, "[f]ederalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." *Horne v. Flores*, ___ U.S. ___, 129 S. Ct. 2579, 2593-94 (2009).

Contrary to the Second Circuit's blandishment "that any constitutional infringement" resulting from the delay in correcting the Secretary's incorrect interpretation can "be addressed in due course," it seems highly unlikely that the Secretary will return that money if the State's position is eventually vindicated in the courts. App. 17 n.5. Thus, any delay – including the delay that would result from additional administrative proceedings – results in direct costs to Connecticut and its citizens due to the State being forced to conform its educational system to the requirements the Secretary imposes based on his erroneous view of the law. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 175 (1992) (holding that New York's challenge to Spending Clause legislation was ripe even though legislation had not taken effect, where the state had to take immediate action due to its pending operation).

The Second Circuit ignored those real costs, and concluded that the State can only obtain judicial review on this important legal question if it incurs yet another hardship and further delay by going through the motions to submit yet another amended plan to the Secretary so the Secretary can reject that plan in his administrative process, glibly asserting that "further administrative proceedings may be the most effective way to save the State this money." App. 16.[6]

That demonstrates the fundamental unreality of the Second Circuit's opinion. The best way for the State to save the money it has been forced to expend as a result of the Secretary's unlawful actions – or at least stop the bleeding – is not to waste time initiating yet another administrative proceeding asking the Secretary to re-consider his hardened legal position, but rather to have a court correct the Secretary's unlawful interpretation through judicial review. The State was entitled to that review when it filed this

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[6] The Second Circuit distinguished this case from *Abbott Labs.* on the ground that here – unlike in *Abbott* – "'further administrative proceedings are contemplated.'" App. 15 (quoting *Abbott Labs.*, 387 U.S. at 149). However, the Secretary has already denied the State's administrative requests and the State has consistently – and vociferously – taken the position that no further administrative proceedings were necessary. *See, e.g.*, App. 109, 165 (noting that "the Secretary's third and final denial of the State's requests . . . came in June 2005" and that "there apparently are no other plan amendments pending before the Secretary"). Only the Secretary contemplates further administrative proceedings, to avoid judicial review of his legal position, and the courts wrongly abetted that avoidance.

suit in 2005, and the Sixth Circuit correctly recognized as much. *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring). The Second Circuit's decision holding that the State must further delay that review and submit to the Secretary's jurisdiction is incorrect and this Court should reverse it. *Cf. Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, ___ U.S. ___, 130 S. Ct. 1758, 1767 n.2 (2010) (holding that challenge to arbitration panel's award was ripe where it "means that petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration absent the parties' agreement to resolve their disputes on that basis.").

II. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S SPENDING CLAUSE DECISIONS

This Court has long recognized that "'[l]egislation enacted pursuant to the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Arlington Central School Dist. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Thus, in determining whether the Secretary can validly force Connecticut – and other states – to expend state funds to comply with unfunded NCLBA mandates, the courts "must view the [NCLBA] from the perspective of a state official

who is engaged in the process of deciding whether the State should accept [NCLBA] funds and the obligations that go with those funds" and "ask whether a state official would clearly understand that one of the obligations of" accepting NCLBA funds is that the State would be required to expend state funds on federal requirements that the State's experts believe are not the best use of the money. *Id.*

All the State seeks through this litigation is for a neutral court to review the parties' respective positions on the straightforward – though critically important – issue presented and set the correct ground rules for the parties to the Spending Clause "contract" going forward. The school district plaintiffs in Michigan had an answer from the district court within seven months and now have a definitive – though frustrating[7] – answer from the Sixth Circuit. They may not like that answer (and the State believes that the answer is incorrect), but at least it is an answer.

By contrast, if this Court allows the Second Circuit's decision to stand, the State – after five years of litigation – will be sent back to square one. Instead of having a timely review of the core legal issue by an impartial federal judge, the State will be forced to

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[7] Although a majority of the *en banc* Sixth Circuit agreed with the school districts' position on the merits, overall the court split 8-8, which had the effect of leaving in place the district court's decision ruling in the Secretary's favor on the merits.

initiate yet another administrative process before the Secretary where it is unclear whether the State will be entitled to a hearing and the deadlines for the Secretary's action are amorphous but the result is preordained. Only after enduring that futile and costly process will the State be able to present its good-faith dispute as to the Secretary's legal authority to a court.

Prudential ripeness does not require this result, particularly where a state is seeking only impartial judicial guidance on the proper legal interpretation of legislation enacted pursuant to the spending power. *Cf. New York v. United States*, 505 U.S. 144, 175 (1992) (holding that New York's challenge to Spending Clause legislation was ripe even though legislation had not taken effect, where the state had to take immediate action due to its pending operation). The presumption in favor of reviewability of legal questions embodied in *Abbott Labs.* and discussed above should apply with even greater force in these circumstances. Put simply, it defies common sense to require one party to what is, in effect, a contractual dispute to submit to a process controlled by the opposing party before it can obtain access to a neutral arbiter. The Sixth Circuit recognized this, and the Second Circuit did not.

A comparison of the proceedings in the Second and Sixth Circuits vividly illustrates why the Second Circuit's decision cannot stand. The State of Connecticut brought this suit in 2005, within months of a suit filed against the Secretary in the United States

District Court for the Eastern District of Michigan raising the same core issues. Both suits sought judicial guidance on the same legal question which, though straightforward, has substantial consequences for the entities involved and the children they have the responsibility to educate.

In Michigan, the Secretary moved to dismiss the Complaint based on an alleged lack of standing and failure to state a claim. Tellingly, the Secretary did not even bother to raise a ripeness argument and the district court did not see a need to raise the ripeness issue *sua sponte*. *See, e.g.*, *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003) (noting that "[t]he ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion" (quotation marks omitted)).

The district court correctly concluded that the plaintiffs had standing and addressed the merits of their argument, ruling, incorrectly, that the Unfunded Mandates Provision did not preclude the Secretary from requiring the expenditure of state and local funds to comply with the NCLBA's mandates. Thus, in Michigan, the school district plaintiffs obtained judicial review of their challenge to the Secretary's interpretation of the NCLBA within approximately seven months of filing their Complaint.

Plaintiffs appealed the district court's decision to the Sixth Circuit. On appeal, the Secretary again did not raise an issue as to ripeness and the court, again, did not raise it *sua sponte*. Indeed, even Judge McKeague – on whose *en banc* opinion the Second Circuit relied to find the State's claims unripe – found no jurisdictional impediment to judicial review of the plaintiffs' claims in his initial panel dissent. *Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ.*, 512 F.3d 252, 273-84 (6th Cir.), *vacated by*, 2008 U.S. App. LEXIS 12121 (6th Cir. 2008) (McKeague, J., dissenting).

The Sixth Circuit panel divided on the merits, with Judge Cole and District Judge Breen[8] correctly holding "that NCLB, by its terms, fails to provide clear notice of the States' obligation to incur additional costs to comply with the Act's requirements." *Id.* at 261. In so holding, the court "note[d] that even the Defendant in this matter previously expressed a view of the contested funding provision that coincides with the interpretation that Plaintiffs urge here," referring to statements by then-Secretary Rod Paige "stat[ing] that the Act 'contains language that says *things that are not funded are not required*.'" *Id.* at 271-72 (quoting Paige statement of September 4, 2003) (emphasis added in decision)). The Court noted that then-Secretary Paige "[r]eiterat[ed] this point in a later

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[8] Of the United States District Court for the Western District of Tennessee, sitting by designation.

speech, . . . reassur[ing] that 'if it's not funded, it's not required. There is language in the bill that *prohibits requiring anything that is not paid for*.'" *Id.* (quoting Paige statement of December 2, 2003) (emphasis added in decision)).[9]

The Secretary requested re-hearing *en banc* and the Sixth Circuit granted the request and vacated the panel's decision. Although the Secretary had not raised or briefed the ripeness issue before the district court or the panel, "[i]n accordance with its institutional role, after oral argument the *en banc* court asked the parties to submit supplemental briefs addressing" whether plaintiffs' claims were ripe and whether the court "can . . . properly resolve this case without the presence of the relevant States (Michigan, Texas, and Vermont) as parties or at least without knowing the views of the States on the issues presented?" *Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ.*, 584 F.3d 253, 298 (6th Cir. 2009) (*en banc*), *cert. denied*, 130 S. Ct. 3385 (2010) (McKeague, J., concurring) (quotation marks omitted).

A 13-3 majority of the *en banc* Sixth Circuit disagreed with the Second Circuit's decision in this case and held that prudential ripeness did not preclude the federal courts from addressing the merits of the challenge to the NCLBA. Specifically, Judge Cole –

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[9] The Secretary did not dispute that then-Secretary Paige made the quoted statements, but sought to minimize them at oral argument as "stray comments." *Id.*

joined by seven other Judges – concluded that the concerns underlying the prudential ripeness doctrine were "not present here" because "Plaintiffs present a straightforward, concrete question of statutory interpretation, the answer to which is not dependent on further development of facts or further administrative action." *Id.* at 263. "In short, unless we decide this matter, school district Plaintiffs will be forced to continue expending limited state resources to comply with NCLB." *Id.*

Judge Sutton – joined by four other Judges – agreed with Judge Cole's decision on the ripeness issue, concluding that "[t]he claims are fit for judicial review, and the districts would suffer hardship if we declined to consider them." *Id.* at 279 (Sutton, J., concurring). "'Nothing would be gained by postponing a decision' when '[t]he issue presented is purely legal, . . . will not be clarified by further factual development' and hardship to the parties exists." *Id.* at 279 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581-82 (1985)).

Judge Sutton then directly addressed, and forcefully rejected, the reasoning underlying the Second Circuit's decision, noting that "[w]hile further administrative proceedings might sharpen the nature of some of the school districts' claims, they would not alter or make more concrete the nature of the legal question." *Id.* The Secretary has made his position clear and

> Requiring the school districts to seek waivers or propose plan revisions that the Secretary has confirmed he will not grant – because his interpretation of the Act prevents him from doing so – would merely prolong this litigation, already entering its fifth year. Nor would it help any of the participants in this case, least of all the students attending the affected schools, which is presumably why no party raised this issue on its own. No Lawyer Left Behind is not the name of the Act.

Id. (citation omitted). Thus, an overwhelming majority of the *en banc* Sixth Circuit concluded that the school district plaintiffs were entitled to timely judicial review of the Secretary's interpretation of the NCLBA and that forcing them to submit to further administrative proceedings would be an unnecessary and undue hardship to the districts and the students they educate.

In stark contrast, the Second Circuit concluded – after five years of litigation – that "[a]lthough the State is correct that the Secretary's interpretation of the Unfunded Mandates Provision is clear and that the parties have a concrete dispute about its meaning and constitutionality," the courts would not review that straightforward legal question because further administrative proceedings before the Secretary "might moot the entire lawsuit." App. 14. The court was under no illusion that the Secretary would change his legal position. Rather, the court understood that the administrative proceedings would be premised on the correctness of the Secretary's interpretation but

nonetheless "[r]equir[ed] the [State] to . . . propose plan revisions that the Secretary has confirmed he will not grant[ ] because his interpretation of the Act prevents him from doing so" before the State could obtain judicial review. *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring).

The Second Circuit was able to reach this anomalous result only by ignoring the presumption in favor of reviewability of legal questions the Sixth Circuit recognized and by disregarding the hardship the delay imposed on the State. *Id.* at 279 (Sutton, J., concurring). It recognized that its conclusion was inconsistent with the Sixth Circuit's but "disagree[d]" with that court and – without responding to any of the arguments by the 13-3 majority of the *en banc* Sixth Circuit – simply stated that it was "more persuaded by Judge McKeague's concurrence." App. 15 n.4.

That conclusion is striking, both for its dismissive attitude toward the strong Sixth Circuit majority and for its failure to account for the fact that Judge McKeague – whom the Second Circuit found persuasive – expressly noted that "there is at least one fundamental difference between" the Second Circuit and Sixth Circuit cases, namely, that in the Sixth Circuit "none of the respective States are involved." *Sch. Dist. of Pontiac*, 584 F.3d at 299 (McKeague, J., concurring). "In fact, during oral argument before the *en banc* [Sixth Circuit], counsel for the Secretary argued that *[the Sixth Circuit] case was 'less fit for review' than the* Connecticut v. Spellings *case because, unlike in that case, no State is a party here.*" *Id.* at

300 (emphasis added).[10] Thus, the Second Circuit not only failed to respond to the *en banc* Sixth Circuit's analysis and shrugged it off in a footnote, it failed to even mention that the concurrence on which it explicitly relied saw the cases as fundamentally different and that the Secretary *conceded* in the Sixth Circuit that Connecticut's argument on ripeness was stronger than the school districts' argument, which prevailed 13-3 before that court.

The Second Circuit's decision defies the law and common sense. This Court has never applied the prudential ripeness doctrine to prevent a state from obtaining timely judicial guidance as to its obligations under Spending Clause legislation, and the Sixth Circuit correctly recognized that requiring the State to submit to more administrative proceedings that will "not alter or make more concrete the nature of the legal question" does not "help any of the participants in this case, least of all the students attending the affected schools." *Id.* at 279 (Sutton, J., concurring). Ultimately, courts in the Second Circuit – like courts in the Sixth Circuit – should allow parties

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[10] The Secretary continued to recognize this distinction in opposing the school districts' request that this Court review the Sixth Circuit's decision, arguing that the case was not justiciable, in part, because the school districts sued "without the participation of their respective States." *Brief for the Respondent in Opposition in School Dist. of the City of Pontiac v. Duncan*, No. 09-852, p. 10 (May 7, 2010) (App. 172-73); *see also id.* at p. 13 (App. 173) (arguing that this Court should not address the merits "without the participation of the responsible States").

raising legal questions as to the proper interpretation of Spending Clause legislation to obtain timely judicial review.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully submits that this Court should grant this Petition and issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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State of Connecticut and
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STATE OF CONNECTICUT, GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT, Plaintiffs-Appellants, – v. – ARNE DUNCAN, in his official capacity as Secretary of Education, Defendant-Appellee, CONNECTICUT STATE CONFERENCE OF THE NAACP, INDIVIDUAL MINORITY PARENTS AND STUDENTS IN CT., Intervenors-Defendants-Appellees

Docket No. 08-2437-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

612 F.3d 107; 2010 U.S. App. LEXIS 14256

September 17, 2009, Argued
July 13, 2010, Decided

COUNSEL: CLARE E. KINDALL, Assistant Attorney General (Robert J. Deichert, Assistant Attorney General, on the brief), Office of the Attorney General, Hartford, CT, for Appellants.

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JUDGES: Before: B. D. PARKER, STRAUB, AND LIVINGSTON, Circuit Judges.

OPINION BY: BARRINGTON D. PARKER

OPINION

BARRINGTON D. PARKER, Circuit Judge:

The State of Connecticut and the General Assembly of the State of Connecticut (collectively the "State") allege in these proceedings that the Secretary of Education has misinterpreted the meaning of the No Child Left Behind Act ("NCLBA" or "the Act"), 20 U.S.C. §§ 6301-7941, and has violated the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. The Connecticut State Conference of the National Association for the Advancement of Colored People (the "NAACP") has intervened on behalf of the Secretary.

The first two claims in the State's Second Amended Complaint (hereinafter the "Complaint") seek a declaratory judgment rejecting the Secretary's interpretation of the NCLBA. Claim I alleges that the

Secretary's interpretation is wrong as a matter of statutory interpretation, while Claim II alleges that the Secretary's interpretation violates the Spending Clause and Tenth Amendment of the Constitution. The Complaint's remaining two claims assert that the Secretary violated the APA.

The District Court, in a thorough, thoughtful opinion, granted the Secretary's motion to dismiss in part, finding that it lacked subject-matter jurisdiction to consider the first three claims of the Complaint. *See Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006) (hereinafter "*Spellings I*"). That opinion also dismissed as moot Claim IV's allegation that the Secretary failed to provide the State a required hearing, but denied the Secretary's motion to dismiss the balance of Claim IV. *Id.* In a subsequent opinion, the District Court granted the Secretary's motion for judgment on the administrative record with respect to Claim IV's remaining allegations, and also reiterated its dismissal of the State's request for a hearing. *See Connecticut v. Spellings*, 549 F. Supp. 2d 161 (D. Conn. 2008) (hereinafter "*Spellings II*"). Familiarity with *Spellings I* and *Spellings II* is assumed. We affirm, with a small modification: both the District Court's dismissal of the State's claim for a hearing, and its grant of the Secretary's motion for judgment on the record as to Count IV, are *without* prejudice.

I

The District Court's opinions discuss the relevant provisions of the Act, and we need only briefly review it here. *See Spellings I*, 453 F. Supp. 2d at 468-75. The NCLBA, signed into law by President Bush on January 8, 2002, provides for grants, known as Title I funds, for states to use to fund public education. 20 U.S.C. § 6302. Congress passed the Act pursuant to its power under the Spending Clause of the Constitution, Article I, Section 8. As with all Spending Clause legislation, Congress was permitted to, and did, attach conditions to the receipt of those funds. *New York v. United States*, 505 U.S. 144, 167, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). States have the choice whether to fulfill the requirements of the NCLBA, or else forego the grants.

By and large, the Act's provisions require states to administer certain mandatory assessments to students and to demonstrate accountability using the results of those assessments. *See* 20 U.S.C. § 6311(b). Each state that wishes to obtain Title I funds under the NCLBA must submit a plan to the Secretary demonstrating how the state intends to comply with the Act. State plans require the Secretary's approval, and the Secretary is authorized both to reject plans that do not comply with the Act's requirements, *id.* § 6311(e), and to penalize non-compliant states, *id.* § 6311(g). The Secretary may also grant waivers from the Act's requirements. *Id.* § 7861.

At the core of this litigation is the so-called "Unfunded Mandates Provision," which appears in a separate section of the Act entitled "Prohibitions on Federal Government and use of Federal funds," and consists of the following "General Prohibition":

> Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.

20 U.S.C. § 7907(a).

II

Connecticut has accepted substantial Title I educational funds, and has had a plan on file with the Secretary since 2002. In January 2005, the State asked the Department of Education to waive certain of the Act's testing requirements. Specifically, Connecticut sought permission to conduct testing in alternate years rather than annually; to conduct cohort analysis;[1] to assess special education students

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[1] Cohort analysis examines the academic progress of a single cohort of students as it moves through the educational system, as opposed to comparing the yearly performance of that cohort to other cohorts from previous years. A "cohort" is a single

(Continued on following page)

at their instructional level, rather than at their grade level, if such testing is deemed appropriate by a student's Individualized Education Program ("IEP");[2] and to permit students with limited English proficiency (known as English Language Learners ("ELL" students)) three years in United States schools before assessing their performance.

On February 28, 2005, the Secretary denied the State's waiver requests to conduct alternate-year testing and to phase in ELL students for three years; requested more information about cohort analysis; and indicated that a DOE policy change on special education was forthcoming. The Secretary announced the new special education policy on April 7, 2005. The new policy did not permit testing special education students at their instructional level, even if consistent with a student's IEP.

On May 27, 2005, after extensive correspondence between the parties, Connecticut State Commissioner of Education Betty J. Sternberg reiterated the State's waiver requests regarding alternate grade testing, ELL student phase-in, and testing special education students at their instructional level. In the same letter, Commissioner Sternberg submitted two

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grade level of students (e.g., all of the students currently in the third grade).

[2] Pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, every special education student is entitled to an IEP to guide his or her education. *See* 20 U.S.C. § 1414.

proposed amendments to Connecticut's NCLBA accountability plan. The proposed amendments essentially embodied the waiver requests for phasing in ELL students and testing special education students at their instructional level, but did *not* discuss the State's waiver request concerning alternate-year assessments.

On June 20, 2005, the Secretary informed Commissioner Sternberg that the proposed plan amendments had been denied. At no point was the State provided the opportunity for a hearing on its proposed plan amendments. In August 2005, the State sued the Secretary. Since then, the State has continued to comply with the Act's requirements, and the Secretary has taken no enforcement action against the State.

III

The crux of the State's lawsuit boils down to one core allegation: the Unfunded Mandates Provision of the NCLBA requires the State to be funded the full amount of any costs required to comply with the Act, but the State is nevertheless currently paying more to comply than it is receiving in Title I educational grants. In the State's view, the "Unfunded Mandates Provision" unambiguously prohibits the Secretary from requiring a state to spend its own money to comply with an accountability plan. In the alternative, the State argues, if the meaning of the Unfunded Mandates Provision is ambiguous, then the Act

violates the Spending Clause because a state can only agree to be bound by federally imposed conditions on funding when those conditions are set out unambiguously. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296, 126 S. Ct. 2455, 165 L. Ed. 2d 526 (2006). Additionally, the State contends, the Secretary's interpretation of the NCLBA violates the Tenth Amendment because its penalties – namely, the potential loss of all federal education funds – are "so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (internal quotation marks omitted). The State did not raise these statutory and constitutional arguments to the Secretary when it requested its proposed waivers and plan amendments.

On appeal, the State challenges the District Court's ruling on a number of grounds: (1) its conclusion that it lacked subject-matter jurisdiction over Claims I and II pursuant to *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 114 S. Ct. 771, 127 L. Ed. 2d 29 (1994), because Congress did not intend for courts to exercise pre-enforcement review of these claims; (2) its determination that Claims I and II are not ripe for review; (3) its finding that the State's request for a hearing on its plan amendments was waived or moot; and (4) its holding that the Secretary's disposition of the State's proposed plan amendments and waiver requests was not arbitrary or capricious. The State also reiterates the merits of its underlying claims about the Unfunded Mandates Provision.

We agree that the State's Unfunded Mandates Provision arguments are not yet ripe for judicial review, and therefore we affirm the District Court's dismissal of Claims I and II on that basis without reaching the issues presented by *Thunder Basin*. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999). With respect to Claim IV, we cannot conclude – as the District Court did in *Spellings I* – that the State's request for a hearing on its proposed plan amendments was waived. However, because the State now represents on appeal that a hearing would be futile without a resolution of the unfunded mandates issue, and because that issue is not ripe for review, we affirm the District Court's dismissal of Claim IV as well. Nonetheless, in doing so, we modify the dismissal to clarify that it is without prejudice. We also affirm the District Court's judgment that the Secretary's ultimate disposition of the State's proposed plan amendments and waivers was neither arbitrary nor capricious, but we clarify that this decision too is without prejudice.

IV

With respect to those claims that the District Court found ripe, we have appellate jurisdiction under 28 U.S.C. § 1291. We review *de novo* a District Court's legal conclusions, including the grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Leibowitz v. Cornell Univ.*, 445 F.3d 586, 590 (2d Cir. 2006). A district court's ripeness determination is also

a legal determination subject to *de novo* review, *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005), as is a grant of judgment on the record, *see Jarvis v. Ford Motor Co.*, 283 F.3d 33, 43 (2d Cir. 2002).

A. The Unfunded Mandates Provision

"Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807-08, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (internal quotation marks omitted). "At its heart is whether we would benefit from deferring initial review until the claims we are called on to consider have arisen in a more concrete and final form." *Murphy*, 402 F.3d at 347. In the District Court's view, the first two claims of the Complaint will be better decided once there is an administrative record that addresses the State's concerns about the Unfunded Mandates Provision. We agree.

In its leading case on ripeness, the Supreme Court held that determining whether a dispute is ripe for review requires a two-pronged analysis of (1) whether the issues presented to the district court are

fit for review, and (2) what hardship the parties will suffer in the absence of review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). Analyzing the first prong of the ripeness inquiry, the District Court held that Claims I and II were not fit for review until the agency addressed the factual and legal positions at the core of the State's unfunded mandates claims. The District Court noted that an administrative record would help the Court to evaluate the Secretary's claim that "the State can satisfy the testing requirements of the Act in a manner that is fully funded by the federal Government," thus potentially obviating the need for litigation. *Spellings I*, 453 F. Supp. 2d at 490. The District Court observed further that its decision-making could only be enhanced by "having some concrete action by the Secretary to review." *Id.* The Court stated that "consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to apply and/or enforce the regulation." *Id.* at 491. Next, analyzing the hardship prong, the District Court concluded that the State was not suffering significant hardship because the State remains in compliance with the Act, thus continuing to receive funds while facing "no imminent enforcement action by the Secretary." *Id.* The Court emphasized that it is unclear what steps, if any, the Secretary would take against the State in the event of noncompliance. *Id.* Finally, the District Court observed that the administrative

forum remains an alternative venue in which the State can seek relief without risking the consequences of noncompliance. *Id.*[3]

We review the District Court's ripeness determination bearing in mind that "[b]oth aspects of the inquiry involve the exercise of judgment, rather than the application of a black-letter rule." *Nat'l Park Hospitality Assoc.*, 538 U.S. at 814 (Stevens, *J.*, concurring). We have repeatedly observed that "when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later. . . . [not] that the case is not a real or concrete dispute

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[3] We also note that although the District Court understandably (and properly) cross-applied its ripeness analysis of Claim I to Claim II, *see Spellings I*, 453 F. Supp. 2d at 494, the doctrine of constitutional avoidance further argues in favor of finding Claim II prudentially unripe. As Judge Leval has written:

> Ripeness principles . . . bear heightened importance when, as in the present case, the potentially unripe question presented for review is a constitutional question. If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.

Bronx Household of Faith v. Bd. of Educ. of City of N.Y., 492 F.3d 89, 114 (Leval, *J.*, concurring) (internal quotation marks omitted). *See also Ashwander v. Tennessee Valley Ass'n*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, *J.*, concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

affecting cognizable current concerns of the parties." *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008) (quoting *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003) (internal citations omitted) (emphasis in original)). "Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Id.*

Although the State is correct that the Secretary's interpretation of the Unfunded Mandates Provision is clear and that the parties have a concrete dispute about its meaning and constitutionality, the District Court did not err in concluding it would benefit from a more developed administrative record and that therefore this case is not yet fit for review. As a result of the State's requested plan amendments and waivers, we know how the State proposes to bridge any gap between its Title I funds and its costs of complying with the NCLBA. But we do not yet have a clear picture of solutions the Secretary might propose, or, for obvious reasons, the State's position on any such solutions. *See Nevada v. Dep't of Energy*, 457 F.3d 78, 84, 372 U.S. App. D.C. 432 (D.C. Cir. 2006) (noting that ripeness doctrine is designed in part to protect "the agency's interest in crystalizing its policy before that policy is subjected to judicial review"). The Secretary contends that "the State's cost estimates [for compliance with the NCLBA]

reflect a misunderstanding of its statutory obligations," in particular by overestimating the requirements for administering assessments to special education students and ELL students; according to the Secretary, the State can meet its responsibilities under the Act using its current Title I grants. Resp. Br. at 26-28. The State disagrees. While the District Court is capable of resolving this factual and legal dispute, administrative proceedings are a more suitable venue because they will allow for fact-intensive inquiries related to educational finance, the agency's area of expertise. These proceedings will also provide an opportunity for the parties to design an amended plan that satisfies the State's specific fiscal objections. Neither the underlying factual dispute nor the process of designing an amended plan, which might moot the entire lawsuit, are undertakings readily accomplished in the district court in the first instance. *Cf. Sharkey v. Quarantillo*, 541 F.3d 75, 90 (2d Cir. 2008).

The Secretary has taken no final action attributed directly to his interpretation of the Unfunded Mandates Provision, and perhaps further administrative proceedings – which could include the resolution of pending factual disputes about the Secretary's suggestion of cost-cutting measures different from those already proposed by the State – would render such final action unnecessary. "[F]aced with a concrete proposal and specific facts . . . the state education department [ ] and the Secretary would have the opportunity to craft a compromise solution that would

avoid the need for a lawsuit." *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 299 (6th Cir. 2009) (en banc) (McKeague, *J.*, concurring).[4] This case therefore differs from *Abbott*, in which the Supreme Court found that a drug manufacturer's challenge of an FDA regulation was fit for review in part because "all parties agree that the issue tendered is a purely legal one" and there was "no claim . . . that further administrative proceedings are contemplated." *Abbott*, 387 U.S. at 149. Judge Kravitz was thus on solid ground in concluding that this case is not yet fit for review.

"Even if resolution of a dispute could be facilitated if a court waited for a specific application of the issues in contention, the question may, nonetheless, perhaps be justiciable under the second ripeness factor if the challenged action creates a direct and immediate hardship for the parties." *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 226 (2d Cir. 1998). Thus, although the issues presented in Claims I and II are not yet fit for review, we still consider the hardship prong with the understanding that it alone can, if sufficiently weighty, render a claim ripe. "In assessing the possible hardship to the parties resulting from withholding judicial resolution, we ask whether the challenged action creates a direct and immediate dilemma for the parties. The mere possibility of

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[4] The Sixth Circuit, considering similar claims, found them justiciable. We disagree, and are more persuaded by Judge McKeague's concurrence.

future injury, unless it is the cause of some present detriment, does not constitute hardship." *Simmonds*, 326 F.3d at 360 (internal quotation marks and citation omitted).

As the District Court emphasized, the State remains in compliance with the Act and faces no imminent enforcement action by the Secretary. Moreover, the State remains free to propose a new plan amendment based on its unfunded mandates argument. *Spellings I*, 453 F. Supp. 2d at 491. Assuming *arguendo* that the State continues to meet its obligations under the Act while reinitiating the administrative process, the only potential material hardship to Connecticut is any state funds it must continue to expend on compliance. The State cites a study finding that Connecticut's own cost of compliance between 2002 and 2008 totaled $ 41.6 million. App'x 281. Although we accept all material allegations of the complaint as true for the purposes of a motion to dismiss, *United States v. Vazquez*, 145 F.3d 74, 81 (2d Cir. 1998), and thus assume that the State is in fact accruing these costs, we also note that further administrative proceedings may be the most effective way to save the State this money. The availability of this potentially salutary administrative remedy distinguishes this case from those in which we have found pre-enforcement claims ripe because they forced plaintiffs to "either incur great expense to comply" with a law or else "run the risk of incurring potentially even greater burdens" for noncompliance. *Thomas v. City of New York*, 143 F.3d 31, 36 (2d Cir. 1998)

(only options livery drivers had to object to a new law requiring payment of bond for their licences was to pay or else to violate the law); *see also Gary D. Peake Excavating Inc. v. Town Bd. of Town of Hancock*, 93 F.3d 68, 72 (2d Cir. 1996) (going through permit process was futile where town dumping statute criminally punished the work for which plaintiff sought a permit).[5]

B. Plan Amendments

With respect to its proposed plan amendments, the State claims that it was improperly denied a hearing on those amendments, and that the Secretary's denial of those plan amendments was arbitrary and capricious. In *Spellings I*, the District Court found that the State's request for a hearing was moot because the State had asked the District Court to rule on the merits of those plan amendments and did not ask the District Court to "remand" the case. 453 F. Supp. 2d at 502-03. Although it never moved for

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[5] The State further contends that its rights are undermined by a finding of unripeness because the State is, in the meantime, either being subjected to an erroneous interpretation of the Act, or else an unconstitutionally ambiguous statute. But this argument merely restates the underlying claims; the delay *itself* is not the cause of any constitutional infringement that cannot otherwise be addressed in due course. *Compare Shalala*, 144 F.3d at 227 (finding plaintiffs' underlying First Amendment claim unripe, but noting that a finding of unripeness created a separate prior restraint claim that required immediate disposition).

reconsideration, the State again raised this claim in its motion for a final judgment on the plan amendments. In *Spellings II*, the District Court declined to "revisit its decision to dismiss the State's hearing claim" because it concluded that the State had admitted during oral argument that "the question for the Court is purely one of law for which an administrative hearing is unnecessary." 549 F. Supp. 2d at 171. In *Spellings II*, the District Court also found that the Secretary's decision to deny the State's proposed plan amendments was not arbitrary or capricious. *Id.* at 173-77.

The State contends that the District Court misunderstood the State's position, and that the State has in fact sought a hearing throughout the course of this litigation. On the merits of that claim, the State argues that the District Court should have found that the NCLBA and the Secretary's regulations, taken together, required the Secretary to grant the State's request for a hearing. First, the State relies on the NCLBA provision stating that "the Secretary shall not decline to approve a State's plan before providing a hearing." 20 U.S.C. § 6311(e)(1)(E)(iii). Second, the State points to a regulation providing that "[t]he Secretary uses the same procedures to approve an amendment to a State plan – or any other document a State submits – as the Secretary uses to approve the original document." 34 C.F.R. § 76.142. In the State's view, because the Secretary uses the same procedures to approve amendments to plans as it does to approve the original document, and because the Act specifies

that a request for a hearing on the original document must be granted before a plan is rejected, a hearing must be granted before rejecting plan amendments.

As a threshold matter, the District Court may have been mistaken when it concluded in *Spellings I* that the State was not seeking a hearing. In support of that conclusion, the District Court relied on two sources: the Second Amended Complaint, and a brief filed by the State during the course of this litigation. The Second Amended Complaint asked the District Court to "[i]ssue an order to the Secretary requiring her to provide a hearing before she denies a plan amendment." The District Court imprecisely observed that "[i]f the Secretary did in fact violate the Act by not providing the State with a hearing, the proper remedy would be a *remand* for the Secretary to hold a hearing." 453 F. Supp. 2d at 502 (emphasis added). In support of that observation, the District Court cited *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985). In *Florida Power*, the Court was considering a petition for review of a decision of the Nuclear Regulatory Commission, which was brought pursuant to a federal statute specifically granting jurisdiction over such petitions to the federal courts of appeal. *Id.* at 746. Here, in contrast, the District Court's jurisdiction was original, pursuant to 28 U.S.C. § 1331, and not appellate. *See* 5 U.S.C. § 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy

thereof, any applicable form of legal action, including actions for declaratory judgments . . . in a court of competent jurisdiction."). Accordingly, it is of no moment that the complaint never used the word "remand," as the District Court's original jurisdiction would have allowed it to order injunctive relief requiring a hearing on the plan amendments. It was enough that the State sought an order requiring that a hearing be held. The brief that the District Court relied on, meanwhile, argued only that further administrative proceedings would be futile with respect to a plan amendment for alternate grade testing, which the State never proposed.[6]

In *Spellings II*, the District Court again found that the State's request for a hearing was moot, this time relying both on its erroneous belief that the request had been waived, and on the separate ground that there is no "need" for such a hearing. 549 F. Supp. 2d at 170-71. The District Court observed, "at argument on the APA appeal, the State once again

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[6] Ironically, the Secretary argued below that the State, had it proposed an amendment about alternate grade testing, "could obtain an administrative hearing and judicial review under the APA" in the event that the Secretary denied the amendment. In response, the State argued that proposing a plan amendment about alternate grade testing would be futile precisely because of the Secretary's track record of failing to provide hearings, as in the case of the State's two already-rejected plan amendments concerning special education testing and ELL phase-in. *See* Pl. Supp. Br. on Matters Raised during the Apr. 28, 2006 Oral Arg., Doc. No. 64, *Connecticut v. Spellings*, No. 3:05CV13330 (D. Conn. May 19, 2006), at 11-12.

stated . . . there is no need for a remand or a hearing." *Id.* at 171. The record on appeal, however, suggests that the State's contention below was more nuanced. Though the State was "not adverse to obtaining a remand for a hearing," it felt that a hearing "would be futile" if held *before* "the Court rules on the pending matters of legal interpretation." *See* Pl. Reply Br. in Supp. of Its Mot. for Judg. on the Rec., Doc. No. 148, *Connecticut v. Spellings*, No. 3:05CV13330 (D. Conn. Nov. 5, 2007), at 8-9.

In *Spellings II*, the Court decided some of those legal matters. For the reasons explained by the District Court, we agree that the Secretary's decision to reject the State's proposed plan amendments was neither arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. *See Spellings II*, 549 F. Supp. 2d at 171-77; 5 U.S.C. § 706(2)(A). The agency's decision not to grant Connecticut a hearing on its plan amendments, in contrast, may have been "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). But it appears clear from the State's brief on appeal that the pending legal issue that it wants decided is the meaning of the Unfunded Mandates Provision. App. Br. at 57. That issue must remain unresolved, however, because, as the District Court properly held, the State's unfunded mandates argument is not yet ripe for review.

As a result, we are left in a somewhat delicate position. While the State has a strong argument that it was entitled to a hearing on its plan amendments,

and while the District Court was not entirely correct in finding that claim moot in *Spellings I*, the State now maintains that "nothing could be gained by remanding the case prior to a ruling on the legal merits" of its unfunded mandates claim. *Id.* Because we find that claim unripe, there is no reason to order a hearing on the plan amendments before the agency addresses the State's amendment and waiver requests in the context of the Unfunded Mandates Provision.

In *Spellings II*, the District Court noted that "immediately after the Court's ruling on the Secretary's Motion to Dismiss, the Court suggested to the State that it consider dismissing Count IV without prejudice in order to allow the State to return to the Secretary to develop a detailed record regarding the State's unfunded mandates argument." 549 F. Supp. 2d at 181. The State did not pursue that suggestion, and now, more than three years later, finds itself in essentially the same position. We believe the Secretary should address the Unfunded Mandates Provision in the first instance at the administrative level. Therefore, should the State wish to propose plan amendments based on its interpretation of the Unfunded Mandates Provision, we agree with the District Court that "the State is free to pursue that issue before the Secretary" because we have not ruled on that claim. *Id.* And, based on our analysis, we think it is important that the State be able to re-raise its claim that it is entitled to a hearing on its plan amendments, should the Secretary fail

to provide one. In sum, we decline to reach the issue of whether a hearing is required under the Act because such a hearing is moot unless the State opts to re-raise its unfunded mandates argument by way of a plan amendment, but that issue will no longer be moot if the State does so.

In order to make it clear that the State retains the right to re-propose the same plan amendments, or any other ones, based on its claims about the Unfunded Mandates Provision, and also to continue pursuing its claim that it is entitled to a hearing on its plan amendments, we AFFIRM the District Court's dismissal of the State's hearing claim and its grant of the Secretary's motion for judgment on the record with the MODIFICATION that they are *without prejudice*. We also AFFIRM, but without modification, the balance of the District Court's decision in *Spellings I*.

STATE OF CONNECTICUT, ET AL., Plaintiffs, v. MARGARET SPELLINGS, SECRETARY OF EDUCATION, Defendant.

NO. 3:05CV1330(MRK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

549 F. Supp. 2d 161; 2008 U.S. Dist. LEXIS 34434

April 28, 2008, Decided
April 28, 2008, Filed

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JUDGES: Mark R. Kravitz, United States District Judge.

OPINION BY: Mark R. Kravitz

OPINION

MEMORANDUM OF DECISION

Pending before the Court are a Motion for Judgment on the Administrative Record [doc. # 133] filed by Plaintiffs, the State of Connecticut and its General Assembly (collectively, the "State"), a Cross-Motion for Judgment on the Record [doc. # 145] filed by Defendant, Margaret Spellings, Secretary of Education (the "Secretary"), and a Cross-Motion for Judgment on the Record and Opposition to Plaintiffs Motion for Judgment on the Record [doc. # 142] filed by Intervenor-Plaintiff, Connecticut State Conference of the NAACP (the "NAACP"). For the reasons explained below, the Court denies the State's Motion [doc. # 133], grants the Secretary's Cross-Motion [doc.

145], and grants the NAACP's Cross-Motion [doc. # 142].

I.

The dispute in this case arises under the No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (2006) (the "Act"). The facts underlying this dispute are set forth in greater detail in this Court's previous ruling on the Secretary's Motion to Dismiss [doc. # 18] ("Motion to Dismiss Ruling" [doc. # 87]), familiarity with which is assumed. *See Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006). In its Motion to Dismiss Ruling, the Court addressed "only the threshold issues relating to its jurisdiction and authority to consider the various claims raised by the State," *id.* at 465, and dismissed the first three of the State's four counts of its Second Amended Complaint [doc. # 81] because the Court concluded that it lacked jurisdiction over them. *See id.* at 465, 491, 494, 501; *see also Arizona State Dep't of Educ. v. U.S. Dep't of Educ.*, No. CV061719PHXDGC, 2007 U.S. Dist. LEXIS 8390, 2007 WL 433581, at *7 (D. Ariz. Feb. 6, 2007) ("This Court lacks subject matter jurisdiction over this pre-enforcement declaratory judgment action regarding the meaning of § 6316(b)(2)(B).").[1]

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[1] Count I sought a declaratory judgment to clarify the meaning of 20 U.S.C. § 7907(a), the so-called "unfunded mandates" provision of the Act, Count II asserted that the Secretary's interpretation of the Act violated the Spending Clause and the Tenth Amendment to the U.S. Constitution, and Count III

(Continued on following page)

The Court further declined to address the claims asserted in the State's fourth count, which appealed the Secretary's denials of Connecticut's two proposed plan amendments regarding the timing and method of assessment of two groups of students – special education and Limited English Proficiency ("LEP") students. *See Spellings*, 453 F. Supp. 2d at 464.[2] The

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challenged the Secretary's denials of the State's waiver requests as arbitrary and capricious under the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706(2). See Second. Am. Compl. [doc. # 81], at 40-44.

[2] Count IV provides:

"200. The allegations in Paragraphs 1-199 are alleged and incorporated herein by reference.

201. The Secretary's decisions to deny Connecticut its requested plan amendments constitute final decisions of an administrative agency.

202. The Secretary's decisions regarding plan amendments are governed by the standards and purposes established by the NCLB Act.

203. The Secretary's decisions to deny Connecticut its requested plan amendments are unlawful and contrary to constitutional right, power or privilege, are unsupported by the record and violate the Administrative Procedure Act. 5 U.S.C. § 706(2).

204. The Secretary's interpretation of the Unfunded Mandates Provision of the NCLB Act is unlawful and contrary to constitutional right, power or privilege, and her misinterpretation renders her administrative decisions as unlawful and contrary to constitutional right, power or privilege and in violation of the Administrative Procedure Act.

205. In violation of 20 U.S.C. § 6311(e)(1)(E), prior to denying the State's plan amendments, the Secretary failed to provide the State with an

(Continued on following page)

Court did so because it "conclude[d] that any consideration of the merits of either party's statutory arguments would require further development of the record." *Id.* at 465; *see also id.* at 501-02.[3]

Following issuance of the Motion to Dismiss Ruling, on July 12, 2007, the Secretary submitted an Amended Certified Administrative Record ("A.C.A.R.") [doc. # 132]. Soon after, the State, the Secretary and the NAACP filed their motions for judgment on the administrative record on Count IV.

A. Relevant Requirements of the No Child Left Behind Act

In 2001, pursuant to its power under the Spending Clause of the United States Constitution, Art. I,

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opportunity to revise its amendments, technical support or a hearing.

206. The Secretary's decisions to deny Connecticut its requested plan amendments are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, privilege or immunity, in excess of statutory jurisdiction, authority or limit, or short of statutory right." Second Am. Compl. [doc. # 81], at 44-45 PP 200-06.

[3] In its prior ruling, the Court declined to decide whether "the Unfunded Mandates Provision and the Constitution are properly before the Court on Count IV." *Spellings*, 453 F. Supp. 2d at 502. *See generally Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 512 F.3d 252, 253 (6th Cir. 2008) ("We . . . conclude that [the Act] by its terms, fails to provide clear notice of the States' obligation to incur additional costs to comply with the Act's requirements.").

§ 8, cl. 1, Congress passed the No Child Left Behind Act, the overriding goal of which, the parties agree, is to ensure high-quality education for all our Nation's children. *See* 20 U.S.C. § 6301. Congress provided that in return for federal educational funds under the Act, States must adhere to a comprehensive set of educational assessments and accountability measures. *See Spellings*, 453 F. Supp. 2d at 469-71 (discussing the Act's requirements in detail). To be eligible for funding under the Act, a State must submit to the Secretary a plan developed by the state educational agency. *See* 20 U.S.C. § 6311(a). Each state plan consists of three primary elements: (1) the adoption of challenging academic content standards and student achievement standards that will be used by the State, its local educational agencies, and its schools, *see* 20 U.S.C. § 6311(b)(1)(A); (2) the development and implementation of a single, statewide accountability system that will be effective in ensuring adequate yearly progress in achieving objectives for educational improvement, *see* 20 U.S.C. § 6311(b)(2)(A); and (3) the implementation of high-quality, yearly student academic assessments that will include, at a minimum, academic assessments in mathematics, reading or language arts, and science, *see* 20 U.S.C. § 6311(b)(3)(A). *See Spellings*, 453 F. Supp. 2d at 469.

As is relevant to the pending motions, the Act states in regard to the first requirement that "[t]he academic standards . . . shall be the same academic

standards that the State applies to all schools and children in the State." 20 U.S.C. § 6311(b)(1)(B). For the second requirement, the Act provides that States must define annual yearly progress in a manner that "applies the same high standards of academic achievement to all . . . students in the State; . . . is statistically valid and reliable; [and] includes separate measurable annual objectives for continuous and substantial improvement for . . . the achievement of . . . students with disabilities [and] students with limited English proficiency." 20 U.S.C. §§ 6311(b)(2)(C)(i), (ii), (v)(II)(cc),(v)(II)(dd). With respect to the third plan requirement, the Act tells States that "the same academic assessments [must be] used to measure the achievement of all children." 20 U.S.C. § 6311(b)(3)(C)(i)-(iii). In assessing the academic progress of students, the Act reiterates that a state must provide for "the participation in such assessments of all students." 20 U.S.C. § 6311(b)(3)(C)(ix)(I). The Act also requires States to provide for "the reasonable adaptations and accommodations for students with disabilities . . . necessary to measure the academic achievement of such students relative to . . . State student academic achievement standards," 20 U.S.C. § 6311(b)(3)(C)(ix)(II), and "the inclusion of [LEP] students, who shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered . . . under this paragraph. . . ." 20 U.S.C.

§ 6311(b)(3)(C)(ix)(III).[4] LEP students must be tested in English after attending schools in the United States for three years, though case-by-case exceptions can be made. *See* 20 U.S.C. § 6311(b)(3)(C)(x).

The Act gives the Secretary "the authority to disapprove a State plan for not meeting the requirements" of the Act, but adds that she "shall not have the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items." 20 U.S.C. § 6311(e)(1)(F). The Act also anticipates the

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[4] Section 6311 states that such assessments shall "(ix) provide for –

> (I) the participation of such assessments of all students;
>
> (II) the reasonable adaptations and accommodations for students with disabilities . . . necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards; and
>
> (III) the inclusion of limited English proficient students, who shall be *assessed in a valid and reliable manner and provided reasonable accommodations* on assessments administered to such students under this paragraph, including to the extent practicable, *assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency* as determined under [20 U.S.C. § 6311(b)(7)]." 20 U.S.C. § 6311(b)(3)(C)(ix) (emphasis added).

possibility that a State may wish to modify its plan after initial approval. In such cases, the Act provides that "[i]f significant changes are made to a State's plan, such as the adoption of . . . new academic assessments . . . such information shall be submitted to the Secretary." 20 U.S.C. § 6311(f)(2); see Spellings, 453 F. Supp.2d at 472.

States receiving funding under the Act are required to use those funds to supplement, and not supplant, funding from non-federal sources used to educate children. *See* 20 U.S.C. § 6321(b)(1). The so-called "Unfunded Mandates Provision" further states,

> Nothing in this [Act] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.

20 U.S.C. § 7907(a).

B. Relevant Regulations Under the Act

Congress empowered the Secretary to "issue such regulations as are necessary to reasonably ensure that there is compliance" with the Act's provisions. *See* 20 U.S.C. § 6571. On July 5, 2002, within the six-month time-period mandated by 20 U.S.C. § 6578, the former Secretary of Education, Rod Paige, issued

final regulations implementing the Act. *See* Improving the Academic Achievement of the Disadvantaged, 67 Fed. Reg. 45038, 45041-42 (July 5, 2002); 34 C.F.R. §§ 200.2, 200.6. These regulations emphasize that the Act requires States to test special education students (a specific subset of "students with disabilities") and LEP students at grade-level standards; in other words, the regulations do not permit out-of-level testing for these students.[5] *See* 67 Fed. Reg. at 45038, 45040-42; 34 C.F.R. §§ 200.2(b), 200.6(a)(1).

On August 6, 2002, Secretary Paige then proposed regulations that would permit the use of alternate assessments for students with the "most significant cognitive disabilities." Improving the

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[5] The regulations revised 34 C.F.R. § 200 to provide in § 200.2(b) as follows: "The assessment system required under this section must . . . (1) Be the same assessment system used to measure the achievement of all students in accordance with § 200.3 or § 200.4. . . . (2) Be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency. . . . (3)(i) Be aligned with the State's challenging academic content and student academic achievement standards. . . ." 67 Fed. Reg. 45040. The Secretary also revised 34 C.F.R. § 200.6 to provide that "[a] State's academic assessment system required under § 200.2 must provide for the participation of all students in the grades assessed," 67 Fed. Reg. 45041, and "do not permit an exemption from participating in the State assessment system for limited English proficient students," 67 Fed. Reg. 45042. *See also* 67 Fed. Reg. 45044-45 (responding to comments to the regulations and stating that "the statute does require that all students be held to the same achievement standards").

Academic Achievement of the Disadvantaged, 67 Fed. Reg. 50986, 50987 (Aug. 6, 2002). He stated that "alternate assessments are an appropriate way to measure the progress of only that very limited portion of students with the most significant cognitive disabilities who will never be able to demonstrate progress on grade level academic achievement standards even if provided the very best possible education" and that these alternate assessments would not apply to "more than 0.5 percent of all students in the grades assessed." *Id.* at 50987, 51005. In the final regulations issued on December 2, 2002, however, the Secretary did not adopt the alternate assessment proposal. Rather, the regulations required that the "same grade level academic content and achievement standards" be applied to "alternate assessments," but Secretary Paige added that he would "propose an exception to this policy for a small group of students with disabilities." Improving the Academic Achievement of the Disadvantaged, 67 Fed. Reg. 71710, 71711 (Dec. 2, 2002). He issued this proposed exception on March 20, 2003, suggesting that students with the "most significant cognitive disabilities," estimated to be only approximately one percent of the entire student population, be tested using alternate assessments. *See* Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. at 13797-98; *see also* State's Mot. for J. on R. [doc. # 133], Ex. B ("June 27, 2003 Policy Letter") (stating same). In December 2003, the Secretary issued regulations adopting the one percent exemption from testing. *See*

Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68698, 68700-01 (Dec. 9, 2003); 34 C.F.R. §§ 200.1(d), 200.6(a)(2).[6] In doing so, the Secretary stated that "[i]n order to improve instruction and achievement for all students with disabilities, the Department expects States to assess as many students as possible with academic assessments aligned to regular achievement standards." 68 Fed. Reg. at 68700.

Following publication of the final regulations, on December 3, 2004, Congress passed legislation – the Individuals with Disabilities Act (the "IDEA"), 20 U.S.C. § 1412 (2006) – that statutorily adopted the one percent exemption that was contained in the Secretary's final regulations. The IDEA specifically allows local educational agencies to "measure the achievement of children with disabilities" against "alternative academic achievement standards permitted under the regulations promulgated to carry out section 6311(b)(1)" of the Act. 20 U.S.C. § 1412(a)(16)(C)(ii)(II).[7] In a policy letter issued on

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[6] The alternate achievement standards and assessments for this population must meet certain criteria set forth in 34 C.F.R. § 200.1(d).

[7] More recently, the Secretary adopted modified achievement standards, which the Secretary says allow for modification of "content mastery . . . , but not the grade-level content standards on which those expectations are based." Cross-Mot. for J. on R. [doc. # 145], at 8; *see* 34 C.F.R. § 200.1(e); Improving the Academic Achievement of the Disadvantaged; Individuals With Disabilities Education Act (IDEA) – Assistance to States for the

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May 10, 2005, Secretary Spellings discussed the one percent exemption, stating:

> [I]n the past, [students with disabilities] have often been held to lower standards and assessed in ways that failed to accommodate their disabilities and demonstrate what they know. As a result, I support emphatically the requirements that are the cornerstone of [the Act]: that ***all*** students, including students with disabilities, be held to challenging content and achievement standards; that their progress be measured annually by high-quality assessments aligned with those high standards; and that school districts be held accountable for achieving results.

A.C.A.R. [doc. # 132], Tab 5 ("Policy Guidance including Guidance regarding Students with Disabilities (amended pursuant to May 17, 2007 Court Order)) (emphasis added).

The Secretary also provided further guidance on the Act's requirements for assessing LEP students. On February 20, 2004, Secretary Paige issued a policy statement commenting that "additional flexibility is needed to ensure that NCLB supports and improves the educational opportunities for all students, especially [LEP] students." A.C.A.R. [doc. # 132], Tab 26. Later, in June 2004, Secretary Paige published proposed regulations, *see* Improving the

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Education of Children With Disabilities, 72 Fed. Reg. 17748 (Apr. 9, 2007).

Academic Achievement of the Disadvantaged, 69 Fed. Reg. 35462, 35463, 35465 (June 24, 2004), which provided, in relevant part, that States "may exempt a recently arrived student from *one* administration of the State's reading/language arts assessment under § 200.2," but must still assess these students in English language proficiency and mathematics. *See* 69 Fed. Reg. at 35465 (emphasis added). The June 2004 LEP proposed regulations were based in part on the recognition that "taking a State's reading/language arts assessment, even with accommodations, requires a certain level of English language expertise." *Id.* at 35463. Later, on September 13, 2006, Secretary Spellings issued the final set of regulations regarding LEP students. The final regulations, in pertinent part, allowed States to exempt LEP students from a State's reading/language arts assessments for their first year in school in the United States. *See* 34 C.F.R. § 200.6(b)(4); Improving the Academic Achievement of the Disadvantaged, 71 Fed. Reg. 54188 (Sept. 13, 2006). In responding to suggestions that the exemption should be extended, the regulations stated:

> [I]t was important to have a time limit to ensure that the one-time exemption is used only for LEP students who have recently arrived in schools in the United States, not for those students who have lived in the United States for a number of years and attended United States schools but who still possess limited proficiency in English. . . . [T]he purpose of the regulations is to afford

> [local educational agencies] time to provide instruction in English as well as content to recently arrived LEP students to prepare them to take the State's assessment in reading/language arts the following year. . . . The Secretary recognizes that the LEP subgroup is one whose membership can change from year to year as students who have attained English proficiency exit the subgroup and new students not proficient in English enter the subgroup.

71 Fed. Reg. at 54190.

C. Connecticut's Proposed Plan Amendment

On March 31, 2005, following the submission of Connecticut's plans and correspondence discussing the requirements for LEP[8] and special education

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[8] The State initially proposed that LEP students be exempted from the assessment requirement, but the Secretary denied this proposal. *See* A.C.A.R. [doc. # 132], Tab 31 at 342. The State then submitted a revised plan providing that "[e]ffective September 2003, all LEP students will participate in the state assessments, with or without accommodations. . . ." *Id.*, Tab 31 at 345. In October 2003, the State again noted that it had suggested that the Secretary allow a reasonable amount of time for LEP students to adjust to schools in the United States and English, but that suggestion was rejected by the Secretary. *See id.*, Tab 30 at 306, 308, 311, 314-15. In August 2004, the State submitted a plan that would have allowed recently arrived students to be exempt from testing in their first year, though such exempted students were required to take English proficiency tests. *See id.*, Tab 23 at 248. Finally, on January 14, 2005, the State's Commissioner of Education, Dr. Betty Sternberg, wrote

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students,[9] the State submitted two proposed plan amendments regarding the timing and method of assessment for LEP and special education students. The proposed plan amendments sought: (1) to assess special education students at instructional, rather than grade, level, when deemed "most appropriate"; and (2) to exempt recently arrived LEP students from testing for three years. *See* A.C.A.R. [doc. # 132], Tab 13 at 127-32. Specifically, the proposed plan amendment regarding special education students stated: "We request that we be allowed to return to our practice of testing special education students at their instructional level when their planning and placement teams determine that this is *most appropriate*." *Id.*, Tab 13 at 130 (emphasis added). As to LEP students, the proposed plan amendment read: "Connecticut . . . proposes a reasonable length of time, *three years*, for [LEP] students to be in our schools before

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to the Secretary requesting that LEP students be exempt from testing for three years. *See id.*, Tab 20 at 194. In her February 28, 2005 response, the Secretary denied the request, and added that "final regulations are forthcoming that allow recently arrived LEP students a year to adjust to the educational system before needing to be assessed in reading/language arts. . . ." *Id.*, Tab 17 at 182, but also noted that the Secretary would "not waiver [sic] in the implementation of the NCLB annual testing provisions." *Id.*, Tab 17 at 181.

[9] In her January 14, 2005 letter to the Secretary, Commissioner Sternberg requested that the State be allowed to return to out-of-level testing for special education students when deemed most appropriate, *see* A.C.A.R. [doc. # 132], Tab 20 at 194, but the Secretary denied that request, *see id.*, Tab 17 at 182.

we test them in reading, math and science." *See id.*, Tab 13 at 129 (emphasis added).

After the State's requests had been submitted but before the Secretary had responded to them, the Secretary announced that she would be more flexible in implementing the Act and publicly stated that up to two percent of the student population might have "academic disabilities" and thus may be more appropriately tested using alternative assessment instruments. *See id.*, Tab 5 at 33; Tab 11 at 121. The State then submitted additional letters reiterating its previous request that it be allowed to return to its previous testing practices and welcoming the expected two percent student exemption, but noting some concern with the Secretary's intention to link the alternate assessments of these students to grade-level testing. *See id*, Tab 4 at 30, Tab 8 at 51. On May 27, 2005, Connecticut submitted an updated plan amendment and waiver request letter. *See id.*, Tab 3. Under the "amendment" section, the State's letter reiterated its March 31, 2005 LEP proposed plan amendment, and under the "waiver" section, sought to exempt special education students when deemed most appropriate, which it apparently calculated would occur with up to two percent of the special education students. *See id.*, Tab 3 at 14.

On June 20, 2005, the Secretary denied the State's proposed plan amendments regarding LEP and special education students, because they did "not comply with the statute and regulations." *Id.*, Tab 1. Under a heading labeled "Amendments that are not

fully aligned with the statute and regulations," the Secretary reiterated that the proposed plan amendments "do not comply with the statute and regulations." *Id.*, Tab 1 at 2. As to the request to test special education students at grade level, the Secretary wrote:

> Connecticut requests to assess students with disabilities at instructional levels when deemed most appropriate. The statute and regulations do not allow for students with disabilities to be tested at instructional levels. The only exception to grade-level achievement standards is the authority in the regulations to hold students with the most significant cognitive disabilities to alternate achievement standards.

Id., Tab 1 at 2. Regarding the LEP request, the Secretary stated, "Connecticut requests to exempt recently arrived LEP students for three years from mathematics, reading, and writing assessments. Current policy on this issue allows recently arrived LEP students one year before taking the reading assessment." *Id.*, Tab 1 at 3.

II.

The State now appeals from the Secretary's denials of these proposed plan amendments. In its Motion for Judgment on the Administrative Record [doc. # 133], the State asserts three reasons why the Court should set aside the Secretary's denials: (1) the Secretary failed to provide the State with a hearing in

violation of the Act, thus violating the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706(2)(D); (2) the Secretary's decision regarding the State's proposals for LEP and special education students is arbitrary and capricious and thus violates the APA, 5 U.S.C. §§ 701-706; and (3) the Secretary misinterpreted and misapplied 20 U.S.C. § 7907(a), the "Unfunded Mandates Provision."

In her Cross-Motion for Judgment on the Record [doc. # 145], the Secretary asks the Court to find that the State's procedural complaints are foreclosed by this Court's Motion to Dismiss Ruling or that the Secretary gave the State whatever process was due; that the Secretary did not act arbitrarily or capriciously in denying the State's proposed plan amendments; and that the State's claims regarding the Unfunded Mandates Provision are not properly before this Court or were waived, or in any case, that the Secretary's interpretation of that provision is correct. *See* Cross-Mot. for J. on R. [doc. # 145]. In its Cross-Motion, the Connecticut NAACP takes no position on the State's procedural complaint; however, it opposes the State's second and third grounds for reversal. See NAACP's Cross-Mot. for J. on R. and Opp'n to Pls.' Mot. for J. on R. [doc. # 142], at 1-2.

A. Hearing

The State's first asserted ground for reversing the denials of the proposed plan amendments is entirely procedural. In its brief, the State argues that

in denying its proposed plan amendments, the Secretary failed to provide the State with a hearing, in violation of 20 U.S.C. § 6311(e)(1)(E). *See* State's Mem. in Supp. of Mot. for J. on R. [doc. # 133-4], at 5. The State argues that the Act's prohibition against denying State's plans without a hearing, *see* 20 U.S.C. § 6311(e)(1)(E)(iii), extends to plan *amendments* as well, and that by failing to provide a hearing, the Secretary did not observe the "procedure required by law," a ground for setting aside an agency's action under the APA, 5 U.S.C. § 706(2)(D). *See also* 34 C.F.R. § 76.202 ("The Secretary may disapprove a State plan only after: (a) Notifying the State; (b) Offering the State a reasonable opportunity for a hearing; and (c) Holding the hearing, if requested by the State.").

The Court had thought that this issue was previously resolved. In its Motion to Dismiss Ruling, the Court explicitly addressed this argument as follows:

> That leaves the State's assertion in Count IV that it was denied a hearing on its proposed plan amendments in violation of 20 U.S.C. § 6311(e)(1)(E). In its Complaint, the State requests a declaratory judgment requiring the Secretary to "provide a hearing before she denies a plan amendment." *See* Compl. [doc. # 81] at 47. If the Secretary did in fact violate the Act by not providing the State with a hearing, the proper remedy would be a remand for the Secretary to hold a hearing. . . . However, in other portions of its Complaint and in its briefing to the

> Court, the State has made it clear that it does not want the Court to remand the case to the agency for the hearing requested, but rather asks the Court to rule on the merits of the plan amendments. *Id.* at 46-48; State's Supplemental Br. in Supp. of Def.'s Mot. to Dismiss on Matters Raised During the Apr. 28, 2006 Oral Argument [doc. # 64] at 13-14 (arguing that pursuing the plan amendment process would be futile).

Spellings, 453 F. Supp. 2d at 502. Accordingly, the Court held as follows:

> Given that (1) the State does not seek a remand for the hearing to which it believes it is entitled; (2) the Secretary does not seek a remand; and (3) there are apparently no other plan amendments pending before the Secretary, *the Court dismisses the State's claim for violation of § 6311(e)(1)(E) as moot*. The Court emphasizes that in doing so, it does not reach the question of what would constitute a satisfactory hearing under § 6311(e)(1)(E). That determination is not necessary in this case. The Court therefore denies in part and grants in part the Secretary's Motion to Dismiss [doc. # 18] as to Count IV. The Court denies the Motion to Dismiss with respect to the State's claim that the Secretary's denial of its plan amendment violated the APA. *The Court grants the Motion to Dismiss as to the State's claim that the*

> *Secretary provided an inadequate hearing because that claim is now moot.*

Id. (emphasis added).

The State has never moved for reconsideration, or vacatur, of the Court's ruling. Indeed, the State did not raise this issue again until it filed its motion for judgment, approximately a year after the Court's Motion to Dismiss Ruling. The State says that while putting the administrative record together, it revisited the issue of the need for a hearing. However, the State does not say what it learned in that effort that it did not already know (or should have known) at the time it represented to the Court that it did not want a hearing. Accordingly, the Court is dismayed by the State's very late about-face on this issue.

But the Court's dismay fades quickly in the face of its puzzlement. Because at argument on the APA appeal, the State once again stated – as it had previously represented – that since the Secretary agrees that the State is entitled to APA review of the Secretary's decision to deny the State's proposed plan amendments and since those determinations were (as the Secretary acknowledges) made on the basis of the statute and regulations only and not on the basis of educational policy considerations, there is no need for a remand or a hearing. Thus, as the State presents it, the question for the Court is purely one of law for which an administrative hearing is unnecessary. Even more puzzling, the State clarified at oral argument that its allegation of procedural deficiency is

limited to the Secretary's asserted failure to give the State the opportunity to submit legal briefs demonstrating that the State's requests did, in fact, comply with the Act. Thus, the crux of the State's hearing complaint is that it was never *offered* the opportunity to submit statutory legal analysis. However, the State conceded at oral argument that it never requested the opportunity to submit such briefing, and more importantly, it was never denied such an opportunity. Indeed, the Secretary permitted the State to file numerous and lengthy submissions urging approval of the State's requests or objecting to the Secretary's decisions. Therefore, had the State truly wanted to submit a brief in response to the Secretary's decision, no one would have prevented it from doing so.[10] It is difficult to understand, therefore, what process the State believes it was denied.

In any event, since the State has once again stated that there is no need to remand for a hearing on the issues of law presented by the Secretary's denials, the Court declines to reach the hearing claim that the State now seeks to revive. If the Court needed to remand for consideration of educational policy issues – and it does not – it might be appropriate for the Court to consider what type of proceedings

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[10] The State filed the current lawsuit in Federal Court three months after the denials of the proposed plan amendments. However, it did not raise the hearing issue until August 1, 2006, when it filed its Second Amended Complaint [doc. # 81], which included Count IV.

should occur on remand. Given the Court's decision on the remaining issues, however, there is no need for a remand and therefore, no need to address an issue that is, at best, of only hypothetical interest. As a consequence, the Court will not revisit its decision to dismiss the State's hearing claim. In doing so, the Court emphasizes that it has not considered, nor ruled on, the merits of the State's argument that 20 U.S.C. § 6311(e)(1)(E)(iii) extends to plan *amendments*, as well as state plans.

B. Review Under the Arbitrary and Capricious Standard

As noted above, the Secretary has agreed that its decisions to reject the State's proposed plan amendments are reviewable under the APA and that they can be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). As previously rehearsed, the Secretary's June 20, 2005 letter denying the State's proposed plan amendments stated that the denied proposed plan amendments did "not comply with the statute and regulations." *See* A.C.A.R. [doc. # 132], Tab 1 at 1. Consistent with the letter, the Secretary has repeatedly represented to the Court that her decision to reject the State's proposed amendments was based solely on statutory requirements and not on considerations of educational policy. *See, e.g.*, Sec'y's Opp'n to Mot. for Leave to file Second Am. Compl. [doc. # 77] at 16 ("The decision to approve a plan amendment is based solely on whether the

proposed amendments conform to the applicable statutory and regulatory requirements."); Sec'y's Mem. in Opp'n to Pl.'s Mot. Regarding the Admin. R. [doc. # 118] at 2, 3, 10; State's Mem. in Supp. of Mot. for J. on R. [doc. # 133-4], at 15-23. Counsel for the Secretary reiterated this point during the January 4, 2008 oral argument.

Therefore, the Court wishes to emphasize that it is not faced with the issue of the wisdom of the Secretary's decisions or whether they will hinder, or advance, the educational achievement of Connecticut's LEP students or special education students. While the Court is certainly not an expert on educational policy, one could presumably make a decent argument that testing students who are newly arrived from foreign lands in English, when they are not at all proficient in English, may not be a particularly sensible way to determine the level of the students' academic achievement or knowledge. One might mount a similar argument for testing special education students at grade level, rather than instructional level. But those are not the issues before this Court. The only question is whether the Secretary's denials of the State's requests on the ground that they were contrary to the statute was arbitrary and capricious. For the reasons set forth below, the Court concludes that it was not.

1. Standard of Review

The State bears a heavy burden on this appeal since it must show that the Secretary's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .'" 5 U.S.C. § 706(2)(A). "Agency action is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2d Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)). A court's authority to review agency action under the APA standard is narrow, and the court must ensure that it does not substitute its own judgment for that of the agency. *See id.*

Furthermore, the parties agree that legal review of an agency's "construction of [a] statute" is governed by the two-step inquiry established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The first step is to ascertain "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

intent of Congress." *Chevron*, 467 U.S. at 842-43, *accord N.Y. Pub. Interest Research Group, Inc. v. Johnson*, 427 F.3d 172, 179 (2d Cir. 2005) ("[Courts do] not defer to an agency's interpretation that contravenes Congress' unambiguously expressed intent."). The second step of the *Chevron* inquiry instructs that if the statute is "silent or ambiguous . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnotes omitted); *accord Bell v. Reno*, 218 F.3d 86, 90 (2d Cir. 2000) ("[Courts must evaluate] whether the agency's answer is based on a permissible construction of the statute."). The Court must defer to the agency's construction of the statute "as long as that interpretation is reasonable." *Bell*, 218 F.3d at 90. After- the-fact rationalizations for agency interpretations are disfavored. *See Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 81 (2d Cir. 2006).

At oral argument, the Secretary asserted that the Act is clear and therefore no *Chevron* deference is due to the Secretary. The Court agrees. Thus, under the first step in the *Chevron* analysis, the Court must ascertain what the statute provides and whether the Secretary's finding that the Act bars Connecticut's proposed plan amendments was arbitrary and capricious.

2. Special Education Students

The State's argument with respect to the provisions of the Act regarding special education students

(and for that matter, LEP students) is quite straightforward. According to the State, even the Secretary must agree that the Act permits instructional-level testing for at least some special education students because the Secretary's 2003 regulations exempted from testing one percent of special education students. *See* State's Mem. in Supp. of Mot. for J. on R. [doc. # 133-4], at 42 ("[I]t is apparent that as a matter of legal interpretation, the Secretary determined that the NCLB Act did not preclude the use of alternate assessments, and did not preclude the use of out-of-level testing."). The State does not challenge the validity of that decision but instead argues that the Secretary's regulations show that the Act has flexibility and the only issue is what best achieves its goals – which is a decision grounded in educational policy, not the statute. According to Connecticut, the flexibility provided in the Act is demonstrated because the Act "requires 'all' student participation on one hand, and then sets forth separate statutory directives for special education student assessments, on the other. Although the Act provides for 'reasonable adaptations and accommodations' for students with disabilities, it is silent on the issue of alternative assessments." *See* State's Mem. in Supp. of Mot. for J. on R. [doc. # 133-4], at 32. In short, the State argues that the Secretary acted arbitrarily, capriciously, and contrary to law because she cannot explain why the State's proposed plan amendment for special education students violates the Act, while the Secretary's one percent exemption does not. *See* State's Combined Reply Br. [doc. # 148], at 16.

The Secretary responds that the State's special education amendments "violated the statutory requirement that the same academic standards apply to all students in the state." Sec'y's Cross-Mot. for J. on R. [doc. # 145], at 1. And, she notes, the State "recognized this statutory requirement when it initially sought a waiver" from that requirement. *Id.*, at 1; *see also* A.C.A.R. [doc. # 132], Tab 20 at 193-95 (Jan. 14, 2004 letter requesting waiver), Tab 25 at 286-88 (Apr. 1, 2004 letter noting that out-of-level testing for special education students "require changes in legislation."). The Act, specifically 20 U.S.C. § 6311(b)(3)(C)(ix)(II), does require States to assist students with disabilities in taking these assessments by providing "reasonable adaptations and accommodations . . . necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards." Sec'y's Cross-Mot. for J. on R. [doc. # 145], at 20. Further, she adds, the Act requires States to define the annual yearly progress in a way that separately measures the achievement of students with disabilities. See id. at 20. However, there is no exception from the Act's directive that State develop grade-level assessments and that they "shall be the same academic standards that the State applies to all schools and children in the State." 20 U.S.C. § 6311(b)(1)(B).

The Secretary also disputes the relevance of her December 2003 regulations and in any event argues that the one percent exemption was embraced by

Congress in the IDEA and that the exemption is much narrower than what the State sought in its plan amendment. The Secretary notes that the State's approach (even if capped at two percent of all students as suggested in its May 27, 2005 waiver request) exceeds the scope of the Secretary's 2003 regulations, which were subsequently affirmed by Congress in the IDEA of 2004. Thus, the Secretary argues that her "regulations are narrowly tailored to address a particular issue with respect to very small segments of the . . . students with disabilities populations; in contrast, the State's proposed plan amendment would eliminate Congress's requirement of annual grade-level testing of these students." Sec'y's Reply Brief [doc. # 151], at 5.

The Secretary did not act arbitrarily, capriciously, or contrary to law in concluding that the State's proposed plan amendments were contrary to the dictates of the Act. *See, e.g., Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 177 (2d Cir. 2006) (holding that the Department of Health and Human Services did not act arbitrarily and capriciously in implementing statutory requirement to adjust Medicare reimbursements to reflect differences in hospital wage levels across geographic areas). The very clear message of Congress in the text of the Act was that States should apply the same academic standards to all students – including special education students, who were a particular focus of congressional interest. The Act could not be clearer and nothing about the structure of its provisions suggests otherwise. *See, e.g,*

County of Nassau v. Leavitt, 2008 U.S. App. LEXIS 8922, *13, 2008 WL 1836382, at *5, ___ F.3d ___, ___ (2d Cir. 2008) ("Statutory construction is a holistic endeavor. In interpreting statutes, this Court reads statutory language in light of the surrounding language and framework of the statute.") (quotation marks omitted) (collecting cases).

The Act requires states to adopt challenging academic content and achievement standards and apply the "same academic standards" to "all schools and children in the State." 20 U.S.C. § 6311(b)(1)(B). States must also develop assessments aligned to those standards and those "assessments shall . . . be the same academic assessments used to measure the achievement of all students." 20 U.S.C. § 6311(b)(3)(C)(i); *see also* 20 U.S.C. § 6311(b)(3)(C)(ix)(I) (providing that a State's academic assessments must provide for "the participation in such assessments of all students"). While the State can and must provide reasonable accommodations, as the Secretary's regulations confirm, the accommodations must be those "necessary to measure the academic achievement of the student relative to the State's academic content and academic achievement standards *for the grade in which the student is enrolled*. . . ." 34 C.F.R. § 200.6(a)(1)(i)(A) (emphasis added). As a consequence, the Secretary has repeatedly and consistently construed the Act to prohibit out-of-grade testing for students with disabilities. *See, e.g.*, 67 Fed. Reg. at 45038, 45044- 45. Out-of-grade testing is inconsistent with the Act because, by definition, it does not

measure mastery of academic content or achievement for the grade in which the special education students are enrolled and therefore, does not hold special education students to the same standards as all students. *See* 20 U.S.C. §§ 6311(b)(1)(B), 6311(b)(3)(C)(i)-(iii).

The State's proposal, by contrast, would allow local educational officials to assess special education students at instructional, rather than grade, level, when those officials deemed such testing "most appropriate," without any criteria other than possibly an overall cap of two percent. The Secretary's 2003 regulations do not permit such an open-ended exemption. Nor do they confirm the "flexibility" the State sees in the Act. For whatever authority the Secretary had – or did not have – to adopt the 2003 regulations (a question on which this Court expresses no view), Congress enacted the exemption into law and did so well before the Secretary's ruling on the State's proposed plan amendment. Congress thus concluded that a special, limited exemption for children with the most profound cognitive disabilities should be a part of the Nation's statutory law. That Congress saw fit statutorily to authorize a specific exemption advanced by the Secretary only confirms that Congress did not intend to permit other exemptions, and certainly not an open-ended one such as that sought by the State in its proposed plan amendment.

Of course, the Act authorizes the Secretary to grant waivers from the Act's requirements in certain circumstances. And indeed, the State sought such a

waiver (perhaps reflecting, as the Secretary argues, the fact that the State, too, understood the Act to require grade-level testing for all special education students). It may well be – as the State argues – that sound educational policy supports such a waiver request. But as described in the Court's Motion to Dismiss Ruling, the Secretary denied the State's waiver request, and the Court has concluded (until instructed otherwise by the Second Circuit) that the Secretary's decision is not reviewable in this Court. *See Spellings*, 453 F. Supp. 2d at 494-501.

3. LEP Students

The State also argues that the Secretary's denial of the State's proposed plan to exempt recently arrived LEP students from testing for three years was arbitrary, capricious, and contrary to law. First, the State argues (as it did for special education students) that by proposing a one-year exemption for reading/language assessments for recently arrived students in her June 2004 LEP proposed regulations, *see* 34 C.F.R. § 200.6(b)(4), the Secretary recognized that the Act allows for flexibility. *See* State's Mem. in Supp. of Mot. for J. on R. [doe. # 133-4], at 20 ("The Secretary's statutory interpretation [as described in the June 2004 LEP proposed regulations] clearly did not hinge upon the length of time exempted – rather, it appeared to hinge upon the other assessments implemented during the exemption period. Thus, there is no statutory impediment to the approval of the State's LEP student assessment plan amendment").

Second, the State contends that the Act's LEP student assessment provisions and the overall structure of the Act permit the State's LEP request. As the State reads the Act, the statutory requirement for "'separate-measurable annual objectives for continuous and substantial improvement' is distinct between 'all students,' on one hand, and specific subgroups, including LEP students, on the other." State's Mem. in Supp. of Mot. for J. on R. [doc. # 133-4], at 14; *see* 20 U.S.C. § 6311(b)(2)(C)(v). And, the State adds, although the Secretary's letter denying the State's proposed plan amendment noted that it was not aligned with the Act, the letter also described her then one-year exemption as her "current policy." According to the State, it was only after litigation commenced that the Secretary focused on the statute as the basis for denying the State's proposal, supposedly revealing that the State's proposal was denied on policy, not statutory, grounds. *See* State's Mem. in Supp. of Mot. for J. on R. [doc. # 133-4], at 28.

The Secretary reiterates that she denied the State's proposed plan amendment for LEP students because it "did not meet the requirement of the [Act] that all students be assessed. . . ." Sec'y's Cross- Mot. for J. on R. [doc. # 145], at 1. The references to "valid and reliable manner" and "reasonable accommodations on assessments," the Secretary says, apply to the way in which LEP students are tested, not to whether they should be tested at all. *See id.* at 18. Thus, such accommodations might include use of bilingual dictionaries, or additional time, or the use,

as explicitly provided for in 20 U.S.C. § 6311(b)(3)(C)(ix)(III), of testing in the student's first language for the first three years (at which point, the Act envisions that they will achieve English language proficiency and after which they are to be tested annually in English under 20 U.S.C. § 6311(b)(3)(C)(x)). *See id.* Finally, as was true with the State's special education request, the Secretary points out that Connecticut sought a waiver precisely because the State recognized that the Act prohibited the State's proposal. *See id.* at 1.

The Secretary's denial of the State's proposed plan amendment for LEP students was not arbitrary, capricious, or contrary to law because a three-year exemption for LEP students flies in the face of the Act's explicit requirement that LEP students must be tested annually. Thus, 20 U.S.C. § 6311(b)(3)(C)(ix)(I) expressly requires States to provide for "the participation in [its] assessments of all students." Section 6311(b)(3)(C)(ix)(III) also provides that a State's assessments "shall" provide for "the inclusion of limited English proficient students, who shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments," including assessments in their native language. 20 U.S.C. § 6311(b)(3)(C)(ix)(III). That the Act provides that LEP students must be tested with tests written in English "once they have attended schools in the United States for three years" only further confirms that the Act contemplates testing of LEP students before the three-year mark proposed by the State.

And contrary to the State's argument, nothing in the structure of the Act permits the Court to conclude that a State may treat LEP students differently from non-LEP students, except as expressly provided in the Act, or to decline to test LEP students at all for the first three years after their arrival in the United States. Put a different way, the Act does have special provisions for LEP (and special education) students and does require States to accommodate those students, but not by exempting them entirely from testing for three years (or in the case of special education students, testing them at instructional, rather than grade, level). LEP (and special education) students require reasonable accommodations, not no tests (or different tests).

The one-year exemption adopted by the Secretary does not suggest otherwise. As is made clear from the history of the Secretary's regulations, schools faced difficult decisions on when to test newly-arrived students. Some may have come to the United States a day before the test was administered; some may have arrived eleven months earlier. Given the fact that LEP students arrive at all times of the year, a decision needed to be made as to whom and when to test. The Secretary, who is authorized to issue "such regulations as are necessary to reasonably ensure that there is compliance" with the Act, 20 U.S.C. § 6571, decided to set a fixed date that every State could use to determine when a newly-arrived LEP student needed to take the annual assessments. Her choice for that line between those who needed to be

tested and those who did not was one year, because the Secretary concluded that it was "unfair to hold schools accountable for newly arrived LEP students who have been educated in the U.S. for less than twelve months." Sec'y's Cross-Mot. for J. on R. [doc. # 145], at 19. The Secretary's transitional rule about effective dates for testing LEP students was certainly not an admission that the Act is flexible enough to exempt LEP students from all testing for three years. Rather, it was an attempt to reasonably ensure compliance with the Act in accordance with the Secretary's explicit statutory responsibility, 20 U.S.C. § 6571. As such, the transitional rule does not undermine the Secretary's position that the State's proposed plan amendment is contrary to the terms of the Act.

Finally, the Court rejects the State's argument that the Secretary's mention of "policy" in her June 20, 2005 letter shows that her decision was not based on the statute, but rather on educational policy. The Secretary rejected both of the State's proposals under a heading labeled "Amendments that are not fully aligned with the statute and regulations." A.C.A.R. [doc. # 132], Tab 1 at 2. It is true that in discussing the denial of the LEP proposal, the Secretary's letter states that "*[c]urrent policy* on this issue allows recently arrived LEP students one year before taking the reading assessment. . . ." *Id.* (emphasis added). That language does not cause this Court to conclude that the Secretary denied the State's LEP request on the basis of policy choices and not the statute. By

placing that reference under the above heading, the Secretary's letter denying the State's proposed plan amendments makes it clear that the Secretary's decision was statutory- rather than policy-based. The references to "current policy" in the letter were to the Secretary's regulation allowing for the one-year testing transition period and not to the basis of the Secretary's decision on the State's proposed plan amendments. The Court's interpretation of the Secretary's letter is also consistent with the Secretary's repeated representations to the Court.

C. Unfunded Mandates

The State's final challenge to the Secretary's decisions to deny the State's proposed plan amendments focuses on the Secretary's interpretation of the Unfunded Mandates Provision, 20 U.S.C. § 7907(a). Emphasizing that it does not seek to challenge the substantive requirements of the Act, the State nonetheless argues that it is "challenging how the Secretary has chosen to implement certain portions of the Act without any consideration of the limits placed upon her by the express and explicit language of the Unfunded Mandates Provision." State's Combined Reply Br. [doc. # 148], at 17. The State interprets the Unfunded Mandates Provision to mean that "the federal government cannot oblige the State or localities to spend their own funds to meet the requirements of the NCLB Act" and asserts that the Secretary's decisions on the proposed plan amendments require the State to spend funds and incur

costs not paid for under the Act, in violation of the Unfunded Mandates Provision. *See* State's Mem. in Supp. of Mot. for J. on R. [doc. # 133-4], at 52. While the Secretary disagrees with the State's interpretation of the Unfunded Mandates Provision,[11] her principal retort is that this issue was never presented to the Secretary in connection with her decisions on the proposed plan amendments and therefore the issue is not properly before this Court. See Sec'y's Cross-Mot. for J. on R. [doc. # 145], at 2, 24.

In its ruling on the Secretary's Motion to Dismiss, this Court expressly declined to decide what issues the State could present in connection with its administrative appeal of the Secretary's decision on the State's proposed plan amendments. *See Spellings*, 453 F. Supp. 2d at 502. Instead, this Court said that it would "make that determination only after reviewing the administrative record on the State's plan amendment appeal." *Id.* Having now reviewed with care the administrative record, the Court has no doubt that the very important issue of the proper interpretation of the Unfunded Mandates Provision is not before this Court.

The State contends that it put the Secretary on notice that any decision to deny the State's proposed plan amendments would violate the Unfunded

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[11] The NAACP also objects to the State's interpretation of the Unfunded Mandates Provision. *See* NAACP's Cross-Mot. for J. on R. and Opp'n to Pls.' Mot. for J. on R. [doc. # 142], at 2.

Mandates Provision in the following ways. First, the State reports that it "attached . . . and/or referenced," to its proposed plan amendments, the state statute enacted to comply with the Act, which stated that "any costs of such conformance to the state and local or regional boards of education that are attributable to additional federal requirements of the [Act] shall be paid exclusively from federal funds received [pursuant] to the [Act]." Conn. Gen. Stat. § 10-14n(g) (later amended, *see* Pub. L. No. 06-13, Second Am. Compl. [doc. # 81], P 16); *see* State's Combined Reply Br. [doc. # 148], at 19 (citing A.C.A.R. [doc. # 132], Tab 23 at 221, 232; Tab 30 at 333; Tab 31 at 362). Second, and relatedly, the State asserts that in compliance with § 10-14n(g), it included with one of its submissions a report entitled "Cost of Implementing the Federal No Child Left Behind Act in Connecticut," which estimated an overall NCLB funding shortfall of $ 41.6 million over time and segregated the costs for LEP and special education assessments. *See* State's Combined Reply Br. [doc. # 148], at 19-21 (citing A.C.A.R. [doc. # 132], Tab 16 at iv-v, 156- 57, 159, 173, 175). The State points out that the report was "issued, discussed and adopted by the State Board of Education at the same meeting attended by Deputy Commissioner Raymond Simon," id. at 20, and that a letter the next day from Commissioner Sternberg noted "concerns about the cost of implementing [the Act]," *id.* (citing A.C.A.R. [doc. # 132], Tab 14 at 144). Third, the State cites newspaper articles relating to the unfunded mandates issue, which the State included in its March 31, 2005 formal request for plan

amendments. *See id.* at 21 (citing A.C.A.R. [doc. # 132], Tab 13 at 136, 138-39). Fourth, the State contends that it "vetted [the issue of inadequate funding] in correspondence between the Commissioner and the Secretary." *Id.* (citing A.C.A.R. [doc. # 132], Tab 6, at 46-48, Tab 4 at 28-30). Indeed, the State asserts that it "repeatedly raised the issue of insufficient funding." *Id.* at 19. And in that regard, the State contends that it "proposed solutions for complying with the Act . . . that would be cost neutral." *Id.* at 21.

As the U.S. Supreme Court noted long ago, "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S. Ct. 67, 97 L. Ed. 54 (1952):

> Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Id.; accord Am. Short Line R.R. Assoc. v. United States, 751 F.2d 107, 116 (2d Cir. 1984) (refusing to consider issue not raised before administrative agency); *Nuclear Energy v. EPA*, 362 U.S. App. D.C. 204, 373 F.3d 1251, 1297 (D.C. Cir. 2004) ("It is a hard and fast rule of administrative law, rooted in simple

fairness, that issues not raised before an agency are waived and will not be considered by a court on review."); 33 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 8398, at 397-403 (2d ed. 1995) ("One challenging an agency decision must exhaust all administrative remedies before seeking judicial review. . . . Statutes and judicial interpretation define the scope of the exhaustion doctrine. . . . The exhaustion doctrine also covers the situation where one fails to adequately present an argument or issue to the agency before seeking review."). Further, "'the issue must be raised with *sufficient specificity and clarity* that the tribunal is aware that it must decide the issue, and in sufficient time that the agency can do so.'" *Kachanis v. Dep't of Treasury*, 212 F.3d 1289 (Fed. Cir. 2000) (quoting *Wallace v. Dep't of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989)) (emphasis added); *see also Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 321 n.1 (2d Cir. 2006). This is a standard that the State simply has not met.

As an initial matter, it is clear that in not a single one of the many letters or submissions sent in support of the State's proposed plan amendments did the State ever claim or argue that denials of the State's proposed plan amendments would violate the Unfunded Mandates Provision. Nor do any of the State's plan amendment submissions explain to the Secretary what portion of the Secretary's special

education or LEP "mandates" would be unfunded.[12] Though Connecticut provided estimates of what it would cost to modify and implement assessment policies and accommodations for LEP students and to develop alternate assessments for students with disabilities, *see* A.C.A.R. [doc. # 132], Tab 16 at 156, 158-59, 173, nowhere did it state that the federal funding was insufficient to cover those costs. Instead, the State sought to justify its requests on the basis of reasons other than cost. *See id.*, Tab 13 at 128-30; Tab 3 at 14.[13] Not surprisingly, therefore, the Secretary's

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[12] By contrast, the State's requests to test students in every other year (discussed in *Spellings*, 453 F. Supp. 2d at 478-79, 501) did rely on the additional cost of testing students every year. *See* A.C.A.R. [doc. # 132], Tab 13, at 127, 133; Tab 4 at 29.

[13] The State's January 2005 LEP waiver request stated: "Next, while the U.S. Department of Education is telling the states they can test English language learners in their primary language, the logic and effectiveness of this approach is questionable. Approximately 160 languages are spoken as the primary language in the homes of Connecticut students; the cost of developing alternative tests would be in the tens of millions of dollars. Limiting the development of alternative testing to the most frequently spoken language – Spanish, spoken by a significant majority of our non-English speakers – would limit the cost but create justified equity questions. Let us suppose, however, that it were economically feasible to develop assessments in all other primary languages. If the ultimate goal is to ensure the English language and literacy skills of all students, testing students in their non-English primary language would miss the point. So, too, would testing students in English the first day they come to the United States and enter our schools. Our proposal is that there be a reasonable length of time – in our view, three years – for students to be in our schools learning

(Continued on following page)

letter denying the State's proposed plan amendments makes no reference to the Unfunded Mandates Provision. Nor did the State ever ask the Secretary to reconsider her decision on that basis or to address their supposed unfunded mandates argument.

As the Secretary points out, *see* Sec'y's Reply Brief [doc. # 151], at 7, raising the general issue of "insufficient funding" is not the same as arguing that a decision to deny the State's proposed plan amendments would violate the Unfunded Mandates Provision. Nor does attaching state statutes, reports, and newspaper articles that generally address the issue of funding sufficiently alert the Secretary that denial of the particular plan amendments before her would violate the Unfunded Mandates Provision. Indeed, in many of the instances in which the State asserts that it references Connecticut General Statute § 10-14n(g), the State actually makes reference to other sections of that statute that have nothing to do with funding. *See* A.C.A.R. [doc. # 132], Tab 23 at 221, 232. Moreover, all of the purported references to § 10-14n(g) are buried within lengthy reports. *See* A.C.A.R. [doc. # 132], Tabs 23, 30, 31. Further, the newspaper articles that are attached appear to assume that the State would be expected to contribute towards the expenses of implementing the Act and bemoan the added cost to Connecticut of complying with the Act. *See*

English before being tested in English in reading, math and science." A.C.A.R. [doc. # 132], Tab 20 at 194.

A.C.A.R. [doc. # 132], Tab 13 at 136-39 ("[T]he federal government has enacted a new law, NCLB, which is grossly underfunded, and which will require our Department of Education to spend an additional $ 41 million annually in state money to meet the requirements of the law. . . ."). In short, a reasonable person could not conclude from the State's submissions that it had raised the unfunded mandates issue with sufficient specificity and clarity that the Secretary was aware that she must decide the issue in order to rule on the State's proposed plan amendments..

Courts faced with analogous situations have come to similar conclusions. For instance, in *Wallace*, the Federal Circuit was faced with the question of whether the petitioner had sufficiently raised with the administrative judge the validity of performance standards used to assess the petitioner. The court held that petitioner had not done so, because her purported attempts to raise this issue were limited to one instance in which she raised the objectivity of the performance standards, but only as to a specific issue; another in which she cited to the relevant statute and regulations without a corresponding statement; and other instances in which she raised the issue to parties other than the administrative judge or Board or after the administrative judge would have had an opportunity to request evidence and consider the issue. *See Wallace*, 879 F.2d at 832-33. Also, in *Yahle v. Office of Pers. Mgmt.*, 31 Fed. Appx. 639, 2002 WL 378088, at *3-*4 (Fed. Cir. 2002), the Federal Circuit found that the petitioner did not sufficiently raise the

issue of her effective starting date because though she mentioned the subject in a single statement in pretrial submissions, she failed to respond to the administrative judge's invitation to choose one of two potentially applicable dates and thus had abandoned that claim. Similarly, in *Xiao Ji Chen*, the Second Circuit refused to consider the petitioner's argument that the birth of additional children in the United States excused the untimeliness of her application because although she raised that issue before the Board of Immigration Appeals, she did so "*not* as evidence of changed circumstances excusing an untimely asylum application . . . but rather, as further evidence establishing her alleged 'well-founded fear of persecution.'" 471 F.3d at 321 n.1; *cf. Kachanis*, 212 F.3d at 1294 (finding issue preserved where described in pretrial submissions, closing brief, and closing remarks to the administrative judge, and raised before the Board).

The Court wishes to be clear that it has not ruled on the merits of the State's Unfunded Mandates Provision claim because the argument was never made in connection with these two proposed plan amendments. Therefore, the State is free to pursue that issue before the Secretary. It is truly unfortunate that the Court is unable to reach this issue because the State failed adequately to raise it in the context of the State's proposed plan amendments. For immediately after the Court's ruling on the Secretary's Motion to Dismiss, the Court suggested to the State

that it consider dismissing Count IV without prejudice in order to allow the State to return to the Secretary to develop a detailed record regarding the State's unfunded mandates argument. Instead, the State decided to continue to litigate the issue in this Court. Regrettably, the result is that over a year and one-half after the Motion to Dismiss Ruling, the State is no closer to a determination of this very important issue.

III.

For the reasons detailed above, the Court GRANTS the Secretary's Cross-Motion for Judgment on the Record [doc. # 145], GRANTS the NAACP's Cross-Motion for Judgment on the Record and Opposition to Plaintiffs Motion for Judgment on the Record [doc. # 142] and DENIES the State's Motion for Judgment on the Administrative Record [doc. # 133]. **The Clerk should enter a final judgment in favor of the Secretary and the NAACP and against the State on all counts of its Second Amended Complaint [doc. # 81] and close this file.**

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: April 28, 2008.

STATE OF CONNECTICUT, ET AL, Plaintiffs, v. MARGARET SPELLINGS, SECRETARY OF EDUCATION Defendant.

NO. 3:05CV1330(MRK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

453 F. Supp. 2d 459; 2006 U.S. Dist. LEXIS 69552

September 27, 2006, Decided
September 27, 2006, Filed

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For Connecticut Ed Assn, National Ed Assn, Amicus: Martin A. Gould, Gould, Killian & Wynne, Hartford, CT.

JUDGES: Mark R. Kravitz, United States District Judge.

OPINION BY: Mark R. Kravitz

OPINION

MEMORANDUM OF DECISION

This case arises from a dispute between the State of Connecticut and the U.S. Secretary of Education over each other's obligations under the No Child Left Behind Act of 2001, Pub. L. 107-110, codified at 20 U.S.C. §§ 6301-7941 (the "Act"). Although the State and the Secretary have fundamental, important, and bona fide disagreements about the interpretation and implementation of the Act, they are united in affirming its basic goal of seeking to improve the education of our Nation's children. Indeed, the State expressly disclaims any intent to challenge the Act itself. Moreover, the State is currently in compliance with the Secretary's interpretation of the State's obligations under the Act.

In this case, the State challenges the Secretary's interpretation of several key elements of the Act. In particular, the State asks the Court to clarify the meaning of the so-called "Unfunded Mandates Provision" of the Act, 20 U.S.C. § 7907(a), and to declare that the Secretary's interpretation of that provision is contrary to its plain language and Congress's intent in enacting it. In addition, the State seeks a ruling that the Secretary's implementation of the Act violates both the Spending Clause of the United States Constitution and the Tenth Amendment. Finally, the State alleges that the Secretary violated the Administrative Procedures Act (the "APA"), 5 U.S.C. §§ 701-706, by denying the State's requests for waivers from the Act's requirements and also by denying certain plan amendments submitted by the State.

On the merits, the Secretary disputes the State's interpretation of the Unfunded Mandates Provision and asserts that all of her actions are in accordance with the express terms of the Act. However, the Secretary also raises a number of threshold concerns, including whether this Court lacks jurisdiction to hear this pre-enforcement challenge to the Secretary's interpretation of the Act, whether the State lacks standing to assert its claims, whether the claims themselves are even ripe, and finally, whether the Secretary's denials of the State's waiver requests are decisions "committed to the agency" and thus not subject to judicial review under the APA. For these reasons, the Secretary filed a Motion to Dismiss [doc. # 18] asserting under Rule 12(b)(1) of the *Federal Rules of Civil Procedure* that the Court lacks jurisdiction to hear the State's claims; the Secretary also argues under Rule 12(b)(6) that the State has failed to state an adequate legal claim. Both parties have submitted truly superb briefing and argument on the difficult issues presented by this case. The Court is most grateful to counsel for their professionalism and skill in presenting their positions to the Court.

In this ruling, the Court addresses only the threshold issues relating to its jurisdiction and authority to consider the various claims raised by the State, since the Court concludes that any consideration of the merits of either party's statutory arguments would require further development of the record. Thus, nothing in this ruling should be read as indicating the Court's views about the merit (or lack

of merit) in the State's or the Secretary's underlying arguments about the scope and interpretation of the substantive provisions of the Act. Instead, this decision is all about whether, how, and when the State may present its underlying arguments about the Act to a court.

The "whether, how, and when" are nonetheless critical questions for several reasons. For one, the lower federal courts are courts of limited jurisdiction, and the scope of that jurisdiction is determined by Congress. As the Supreme Court famously remarked in *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L. Ed. 1147 (1850), "courts created by statute can have no jurisdiction but such as the statute confers." For another, the Constitution establishes certain rules regarding who can assert claims and when claims can be asserted in order to ensure that courts are not called upon to resolve abstract questions or provide advisory opinions but instead confine themselves to deciding concrete cases or controversies involving parties who are actually threatened with a real injury that a court decision is likely to remedy. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). For over a year now, the political branches of the State and the federal Government have sparred over their competing interpretations of the Act and its implications for Connecticut. While both parties have engaged in substantial negotiation, posturing and even legal briefing, there has been significantly less concrete action. Finally, courts have wisely developed important prudential

rules to ensure that they exercise restraint and do not unnecessarily inject themselves into disputes committed to the other branches of Government or before the time at which judicial action is required.

Each of the foregoing restrictions on judicial authority is "founded in concern about the proper – and properly limited role – of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). As explained in more detail below, after careful thought and consideration, the Court has decided that it lacks jurisdiction over most of the State's claims, though one claim will remain pending after this ruling.

I.

The procedural history of this case is as follows. On August 22, 2005, the State filed a three-count Complaint [doc. # 1] against the Secretary regarding the Secretary's interpretation and implementation of the Act. The Secretary moved to dismiss the Complaint on December 22, 2005, asserting lack of jurisdiction and other grounds. *See* Motion to Dismiss [doc. # 18]. Following briefing, the Court heard over four hours of oral argument on the Secretary's Motion to Dismiss on January 31, 2006. Underscoring the importance of this case to the State, the Connecticut Attorney General personally argued the motion. At argument, the parties agreed that the State should have an opportunity to amend its Complaint to respond to several concerns expressed by the Secretary

and the Court. The parties and the Court also agreed that the Secretary's Motion to Dismiss would apply to any amended complaint filed by the State. *See* Order [doc. # 36] ("Secretary Spellings' Motion to Dismiss [doc. # 18] will be deemed to apply to any amended complaint the State may file."). The State filed an Amended Complaint [doc. # 43] on February 28, 2006. Another round of briefing ensued, with additional oral argument by way of an on-the-record telephonic conference on April 28, 2006. *See* Defendant's Memorandum Regarding Amended Complaint [doc. # 50]; Minute Entry [doc. # 59]; State's Supplemental Brief on Matters Raised During the April 28, 2006 Oral Argument [doc. # 64]; Defendant's Memorandum Regarding Issues Raised at April 28, 2006 Conference [doc. # 65].

During the April 28, 2006 supplementary oral argument, and in response to allegations in the State's Amended Complaint, the Secretary offered an interpretation of a key provision of the Act that prompted the State to request leave to amend its Complaint for a second time, in order to add a fourth count under the APA relating to the Secretary's rejection of the State's plan amendments. After briefing on the propriety of further amendment, the Court granted the State's Motion for Leave to File Second Amended Complaint [doc. # 72]. *See* Ruling and Order [doc. # 80]. The State filed its Second Amended Complaint [doc. # 81] on August 1, 2006, and the Secretary responded with Defendant's Memorandum Regarding the State's Second Amended

Complaint [doc. # 83] on August 11, 2006. In accordance with the Court's prior rulings, the Secretary's Motion to Dismiss applies to the State's Second Amended Complaint, which for convenience will be referred to in this ruling as the "Complaint."

While the Secretary's Motion to Dismiss was pending, the Court also received from interested nonparties a number of requests to participate in the proceedings. *See* Motion to Intervene [doc. # 33] on behalf of the Connecticut State Conference of the NAACP and Individual Minority Parents and Students ("NAACP Motion"); Letter Motion for Leave to Answer Amended Complaint by Connecticut State Conference of the NAACP and Individual Minority Parents and Students in CT [doc. # 54]; Motion of the National Educational Association and Connecticut Educational Association for Leave to File Amicus Brief in Support of the State of Connecticut [doc. # 58]; Motion to Intervene by Bally and Olf Veldhuis [doc. # 62]; Amended Motion to Intervene by Bally and Olf Veldhuis [doc. # 63]; Motion for Joinder and to Counterclaim State of Connecticut by Bally and Olf Veldhuis [doc. # 71]. While reserving a final decision on the propriety of intervention, the Court granted permission for the NAACP to file a response to the State's Amended Complaint, *see* Intervenors' Memorandum in Response to Amended Complaint [doc. # 56], and also granted permission for and received an Amicus Brief from the National Educational Association and Connecticut Educational Association in Support from the State of Connecticut [doc. # 61]. In

August, the Court denied the motions to intervene without prejudice to their renewal once the Court had ruled on the challenges to its own subject matter jurisdiction. *See* Ruling and Order [doc. # 85]. As the Court explained at the time, it first needed to determine what claims, if any, would remain pending before deciding whether intervention by any of the interested parties was proper on any remaining claims. *See* Ruling and Order [doc. # 84]. Nonetheless, the Court is grateful for the input of these non-parties and it has considered their filings in the nature of amicus briefs in ruling on the present motion.

II.

Inexplicably, given the explicit "without prejudice" nature of its ruling, the NAACP appealed the Court's ruling on the motions to intervene. *See* Notice of Appeal [doc. # 86]. The pendency of that appeal necessarily requires the Court to consider before proceeding any further whether it still has jurisdiction over the case, including the Secretary's pending motion to dismiss, since as a general rule when an appeal is filed, the district court is divested of "control over those aspects of the case involved in the appeal." *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985). For two reasons, the Court is satisfied that it has jurisdiction to continue to consider the Secretary's Motion to Dismiss [doc. # 81].

First, it is not at all apparent to the Court that its denial of the motions to intervene without prejudice and without resolving the merits of those motions constitutes a final order of the Court that may be appealed. It is well settled that where "a notice of appeal has been filed from an order that is non-appealable, jurisdiction does not rest with the Court of Appeals, but remains with the district court." *Hoffenburg v. United States*, No. 00 Civ. 1686 (RWS), 2004 U.S. Dist. LEXIS 20668, 2004 WL 2338144, at *2 (S.D.N.Y. Oct. 18, 2004) (collecting cases). The reasoning behind this rule is, as the Second Circuit has explained, that "no efficiency [is] gained by allowing a party arbitrarily to halt the district court proceedings by filing a plainly unauthorized notice which confers on this Court the power to do nothing but dismiss the appeal." *Leonhard v. United States*, 633 F.2d 599, 610 (2d Cir. 1980). Here, the Court has not decided the merits of the motions to intervene. While the Second Circuit has stated that "dismissals with and without prejudice are equally appealable as final orders," *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002) (internal quotation omitted), that case, and others like it, involved dismissals of an underlying claim, rather than the temporary disposition of a motion to intervene, *see id.* at 93 (citing *Elfenbein v. Gulf & W. Indus., Inc.*, 590 F.2d 445, 449 (2d Cir. 1978); *Allied Air Freight, Inc. v. Pan Am. World Airways, Inc.*, 393 F.2d 441, 444 (2d Cir. 1968); *Rinieri v. News Syndicate Co.*, 385 F.2d 818, 821 (2d Cir. 1967)). More to the point is a decision by the Seventh Circuit, in which the court held

that the "district court plainly expressed its intent not to reach the merits of the motion to intervene" and that because the "decision by the district court did not resolve definitively whether [the putative intervenor] ought to be allowed to intervene . . . [it] is therefore not a final decision within the meaning of 28 U.S.C. § 1291." *United States v. City of Milwaukee*, 144 F.3d 524, 528-29 (7th Cir. 1998).

Second, and in any event, even if the denial of the motion to intervene were a properly appealable order, the Second Circuit has held that the "filing of a notice of appeal only divests the district court of jurisdiction respecting the questions raised and decided in the order that is on appeal." *New York State NOW v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989) *cited in Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2d Cir. 2004). On the present motion, the Court is required to consider only whether it has subject matter jurisdiction, an issue that is unaffected by the requests to intervene. *See* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1917 (2d ed. 1986) ("Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action."); *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965) ("It is well-settled that . . . intervention contemplates an existing suit in a court of competent jurisdiction."). Because the motions to intervene are not relevant to the determination of subject matter jurisdiction, the Court concludes that it retains

jurisdiction over the Secretary's Motion to Dismiss [doc. # 18].

Accordingly, the Court now turns to the Secretary's motion. The Secretary has moved to dismiss this action under Rules 12(b)(1) and 12(b)(6) of the *Federal Rules of Civil Procedure*. *See* Mot. to Dismiss [doc. # 18]. On a motion to dismiss under either Rule 12(b)(1) or Rule 12(b)(6), the Court "must accept as true all material factual allegations in the complaint," *J.S. ex rel. N.S. v. Attica Cent. Schools*, 386 F.3d 107, 110 (2d Cir. 2004). Furthermore, a "complaint should not be dismissed . . . 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Todd v. Exxon Corp.*, 275 F.3d 191, 197-98 (2d Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Thus, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996) (internal quotation omitted).

III.

The following factual summary is taken from the Complaint [doc. # 81], the statutes involved, and certain documents expressly referred to in the Complaint, such as written correspondence between the Secretary and the State available on the website of

the Connecticut Department of Education and incorporated by reference in the Complaint.[1] *See, e.g.*, *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) ("A complaint is deemed to include any written instrument attached to it as an exhibit . . . materials incorporated in it by reference . . . and documents that, although not incorporated by reference, are 'integral' to the complaint.") (citations omitted). Because the State's allegations can only be understood against the backdrop of the federal educational provisions implicated by the State's claims, the Court will begin with a brief summary of the relevant statutory provisions.

A. The No Child Left Behind Act

On January 8, 2002, President George W. Bush signed into law the No Child Left Behind Act of 2001. The Act – a comprehensive, and in some quarters controversial, educational reform – amended the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-7941 (2003)), which provides for federal educational grants to states known as "Title I" funds. The primary purpose of the Act, to which both parties affirm their allegiance, is to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C. § 6301. Academic accountability lies at the core of the

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[1] The website is located at http://www.state.ct.us/sde/nclb/Correspondence/index.html.

Act, which seeks to improve educational attainment by ensuring that "high quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards." 20 U.S.C. § 6301(1); *see also* H.R. Rep. No. 107-63(I), at 281 (2001) (stating that the Act "holds States, local educational agencies (LEAs) and schools accountable for ensuring that all students, including disadvantaged students, meet high academic standards").

Congress enacted the Act pursuant to its power under Article I, Section 8, Clause 1 of the United States Constitution, the so-called "Spending Clause," which permits Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206-08, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (internal quotations and citations omitted). In return for federal educational funds under the Act, Congress imposed on states a comprehensive regime of educational assessments and accountability measures. Congress also required that states use the federal funds made available under the Act "only to supplement the funds that would, in the absence of such

Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds." 20 U.S.C. § 6321(b)(1).

To be eligible for federal funds under the Act, a state must submit to the Secretary a plan developed by the state educational agency. 20 U.S.C. § 6311(a). Each state plan consists of three principle elements:

> * First, the plan must demonstrate that the state "has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the State, its local educational agencies, and its schools to carry out" the Act's requirements. 20 U.S.C. § 6311(b)(1)(A).
>
> * Second, each state plan must show that "the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools and public secondary schools made adequate yearly progress" in achieving objectives for educational improvement. 20 U.S.C. § 6311(b)(2)(A).
>
> * Third, each state must show that the state "has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science. . . ." 20 U.S.C. § 6311(b)(3)(A).

State plans are subject to a peer-review process and require approval by the Secretary. 20 U.S.C. § 6311(e). If a state's plan does not comply with the requirements of the Act, the Secretary is empowered to decline to approve it, *id.*, and is further authorized to impose penalties on noncompliant states, *id.* § 6311(g). The Secretary is also authorized to grant waivers from a majority of the Act's requirements. *Id.* § 7861.

Because provisions of the Act that explain state testing requirements and describe the Secretary's authority to waive provisions and to impose sanctions for non-compliance are central to the dispute between the State and the Secretary, the Court will describe those provisions in detail below. After presenting the relevant provisions of the Act, the Court will turn to the State's description of its own assessment regime, its requests for modification of certain statutory requirements of the Act, and the Secretary's response to those requests.

1. Statutory Testing Requirements

Of particular relevance to the present case, the Act requires states to conduct annual testing of students between grades three and eight, as well as high school students, in the subjects of mathematics and reading or language arts. 20 U.S.C. § 6311(b)(3). States are required to include "all students" in the

annual testing regime, 20 U.S.C. § 6311(b)(3)(C)(ix)(I),[2] including two classes of students that are the focus of the State's claims in this case: (1) those whose grasp of English is limited – known as English Language Learner ("ELL") students; and (2) those who are eligible for special education services, 20 U.S.C. § 6311(b)(3)(C)(ix)(II)-(III).

With respect to students having limited proficiency in English, the Act provides that such students "shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments . . . including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know. . . ." 20 U.S.C. § 6311(b)(3)(C)(ix)(III). Rather than immediately administering English-language tests to non-native speakers, states are encouraged to test students in their own languages, and may do so for up to three years. However, once a student has attended school in the United States for three years, the statutory default becomes assessment in English. Native-language testing, though, may be extended for an additional two years on a case-by-case basis. 20 U.S.C. § 6311(b)(3)(C)(x).[3] Like students with limited

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[2] Section 6311(b)(3)(C)(ix)(I) provides that states shall "provide for . . . the participation in [annual mathematics and reading or language arts] assessments of all students."

[3] Section 6311(b)(3)(C)(x) requires that states provide for "the academic assessment (using tests written in English) of reading or language arts of any student who has attended school in the United States . . . for three or more consecutive school

(Continued on following page)

English proficiency, special education students must be included in the annual testing regime, and states are required to provide "the reasonable adaptations and accommodations for students with disabilities . . . necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards. . . ." 20 U.S.C. § 6311(b)(3)(C)(ix)(II).

In addition to specifying which students must be tested, in which subjects, and with what frequency, the Act contains provisions directed at the quality of state assessments. States may choose the assessments by which they measure proficiency, but those assessments must be aligned with the state's academic standards and must be "consistent with relevant, nationally recognized professional and technical standards," 20 U.S.C. § 6311(b)(3)(C)(iii). The assessments also must include "multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding," 20 U.S.C. § 6311(b)(3)(C)(vi).

The Act provides funds to assist states in developing and administering the assessments required by the Act. 20 U.S.C. §§ 7301-7301b. However, the Act provides states with a limited right to defer

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years," except that a local education authority may decide on a case-by-case basis "to assess such student in the appropriate language other than English for a period that does not exceed two additional consecutive years. . . ."

implementation of their testing programs (though states must still develop the relevant testing materials) if federal funding does not meet certain specified levels:

> A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, that were not required prior to January 8, 2002, for 1 year for each year for which the amount appropriated for grants under section 7301b(a)(2) is less than –
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> (i) $ 370,000,000 for fiscal year 2002;
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> (ii) $ 380,000,000 for fiscal year 2003;
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> (iii) $ 390,000,000 for fiscal year 2004;
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> (iv) $ 400,000,000 for fiscal years 2005 through 2007.

20 U.S.C. § 6311(b)(3)(D). The Court takes judicial notice of the fact that congressional funding has met or exceeded the foregoing amounts for the years in question. *See* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-116, 115 Stat. 2177, 2202-03 ($ 387 million for fiscal year 2002); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 328 ($ 387 million for fiscal year 2003); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 257 ($ 391.6 million for fiscal year 2004); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809,

3144 ($ 400 million for fiscal year 2005). The State does not claim otherwise.

The ultimate purpose of the assessment requirements of the Act is to increase accountability, improve educational attainment, and close achievement gaps between different racial, ethnic, and socio-economic student populations. *See* 20 U.S.C. § 6301. Accordingly, the Act requires schools and states to report the results of student assessments as measured against a benchmark statistic known as Annual Yearly Progress. *See id.* § 6311(b)(2)(B), § 7325. In determining adequate yearly progress, the Act requires states to use a statistically reliable method of measuring student progress based on academic assessments developed by the state. *Id.* § 6311(b)(2)(C)(ii), (iv). A state's definition of adequate yearly progress must also include "separate measurable annual objectives for continuous and substantial improvement" for all students. *Id.* § 6311(b)(2)(C)(v). At the risk of oversimplification, a school or district will fail to satisfy the Annual Yearly Progress requirement if one of certain specified subgroups of students in any grade fails to satisfy the state's annual proficiency standards. *Id.* § 6311(b)(2)(I); *see* Compl. [doc. # 81] 60. Schools or districts that fail to make Annual Yearly Progress face progressively severe consequences and must take corrective measures. *See generally* 20 U.S.C. § 6316(b)(1)-(8).

2. The Secretary's Authority to Approve or Decline State Plans

The Act gives the Secretary authority to approve or decline a state's plan and to impose penalties on non-compliant states. Under 20 U.S.C. § 6311(e), the Secretary must evaluate a state's plan for compliance with the testing requirements described above. The Secretary must approve the plan within 120 days of its submission or immediately notify the state of the reasons for her determination that its plan does not conform to the statutory requirements. *Id.* § 6311(e)(1)(B)-(C). Before the Secretary can formally decline approval of a state's plan, she must "offer[ ] the State an opportunity to revise its plan[,] . . . provide technical assistance in order to assist the State to meet the requirements[,] . . . and provide a hearing." *Id.* § 6311(e)(1)(E). While the Secretary may disapprove a state plan, the Secretary does not have "authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items."

Id. § 6311(e)(1)(F).

The Act also anticipates the possibility that a state may wish to modify its plan after initial approval. In such cases, the Act provides that "if significant changes are made to a State's plan, such as the adoption of . . . new academic assessments . . . such information shall be submitted to the Secretary." *Id.*

§ 6311(f). The relevant subsection does not describe the procedures that apply to the Secretary's review of proposed state plan amendments. The Secretary contends that the required procedures are less rigorous than those required for the evaluation of the initial plan, *see* Def.'s Mem. Regarding the State's Second Am. Compl. [doc. # 83] at 8-16, while the State suggests that the procedures ought to be the same for both, *see* Compl. [doc. # 81] 152.

3. The Secretary's Authority to Waive the Act's Requirements

Although the requirements of the Act are stated in mandatory terms, the Secretary is expressly empowered to waive most of them. Section 7861(a) of the Act states that, subject to certain enumerated exceptions, the Secretary "may waive any statutory or regulatory requirement of this chapter for a State educational agency . . . that receives funds under a program authorized by this chapter . . . [and] requests a waiver. . . ." The Secretary, however, may not grant a waiver from any of ten enumerated statutory provisions, including the requirement that "Federal funds [be used] to supplement, not supplant, non-Federal funds."[4] 20 U.S.C. § 7861(c).

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[4] The statute also prohibits waivers for regulatory requirements related to: "(1) the allocation or distribution of funds to States, local educational agencies, or other recipients of funds under this chapter; (2) maintenance of effort; (3) comparability of services; . . . (5) equitable participation of private school

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A state applying for a waiver must "provide notice and information to the public regarding the waiver request," *id.* § 7861(b)(3), and must submit a proposal that describes "how the waiving of [the targeted] requirements will – (i) increase the quality of instruction for students; and (ii) improve the academic achievement of students," *id.* § 7861(b)(1). The Secretary may grant a waiver for up to four years; after expiration of the waiver, the Secretary may renew it "if the Secretary determines that – (A) the waiver has been effective in enabling the State or affected recipient to carry out the activities for which the waiver was requested and the waiver has contributed to improved student achievement; and (B) the extension is in the public interest." *Id.* § 7861(d)(2). Any decision to grant a waiver (though not to deny one) must be published in the Federal Register and disseminated to interested parties including educators, parents, and advocacy groups. *Id.* § 7861(g). The Secretary must also submit an annual report to Congress "summarizing the uses of waivers . . . [and] describing whether the waivers – (i) increased the quality of instruction to students; or (ii) improved the academic achievement of students." *Id.* § 7861(e)(4).

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students and teachers; (6) parental participation and involvement; [and] (7) applicable civil rights requirements. . . ." 20 U.S.C. § 7861(c).

4. The Secretary's Authority to Impose Penalties for Non-Compliance With the Requirements of the Act

Sections 1234(c-e) of the General Education Provisions Act, Pub. L. No. 90-247, 81 Stat. 814 (codified as amended at 20 U.S.C. §§ 1221-1240 (2003)) ("GEPA"), provide the Secretary with a variety of mechanisms for enforcing the terms of "any program for which the Secretary or the Department [of Education] has administrative responsibility as provided by law," 20 U.S.C. § 1221c, which includes the No Child Left Behind Act. GEPA authorizes the Secretary to compel compliance with statutory requirements of educational programs by withholding federal funds, issuing a cease and desist order, entering into a compliance agreement, or "taking any other action authorized by law with respect to the recipient." 20 U.S.C. § 1234c.

Before the Secretary may withhold payments to any state, however, she must give the state notice of intention to withhold, the basis for the withholding, and must provide the state with an opportunity for a hearing before the Department of Education's Office of Administrative Law Judges (the "ALJ"). *Id.* § 1234d. Although the Secretary may not proceed to *withhold* payments before a state has had an opportunity to be heard, GEPA does authorize her to *suspend* payments pending the outcome of such a hearing. *Id.* § 1234d(b)-(d). The decision of the ALJ may be appealed to the Secretary, who reviews the ALJ's findings to see if there is "substantial evidence"

to support the ALJ's findings. *Id.* § 1234d(e). Unless the Secretary sets aside the ALJ decision, it becomes a final agency action after sixty days. *Id.* § 1234d(f). However, if the Secretary modifies or sets aside the ALJ's decision, that decision becomes a final agency action upon written notification of the Secretary's decision to the recipient of federal funds. *Id.* Appeals from the final agency decision on enforcement are statutorily channeled to the United States Courts of Appeals.[5] If an appeal is taken, the Secretary is barred from acting on the basis of the enforcement decision until judicial review is completed. *Id.* § 1234g(a) ("The Secretary may not take any action on the basis of a final agency action until judicial review is completed.").

While the comprehensive enforcement mechanism set forth in GEPA applies generally to any educational program administered by the Secretary, including the No Child Left Behind Act, the section of the Act that describes states' annual testing requirements contains its own, additional penalty provision. That provision states that the Secretary may penalize states for failing to meet the testing requirements set forth in § 6311(b)(3) of the Act by "withholding funds for State administration . . . until the Secretary

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[5] *See* 20 U.S.C. § 1234g ("A recipient that desires judicial review of a[] [final agency] action . . . shall, within 60 days of that action, file with the United States Court of Appeals for the circuit in which that recipient is located, a petition for review of such action.").

determines that the State has fulfilled those requirements." 20 U.S.C. § 6311(g)(2). Connecticut alleges that its share of federal funds for state administration, under the Act, amounts to approximately $ 3 million per year. Compl. [doc. # 81] P65.

Nothing in the Act itself requires a state to accept federal funds under the No Child Left Behind program. According to the Complaint, however, in 2004, the State of Utah asked the Secretary about the consequences of opting out of the Act and relinquishing the federal funds that it provides. The State asserts that Utah was told that it would lose not only those funds specifically designated for programs under the No Child Left Behind Act, but also twice that amount in funding for other programs calculated by reference to the amount of funding that a state receives under Title I. *See id.* P67. Accordingly, the State alleges that if it were to fail to comply with the Act, the cost to the State could potentially be hundreds of millions of dollars, comprising 5% of overall education spending in the State and as much as 15% of spending in the most disadvantaged school districts. *See id.* P64.

5. The Unfunded Mandates Provision

Although the Secretary is empowered to disapprove a state's plan for failing to comply with the Act's provisions on testing, the Act expressly provides that the Secretary "shall not have the authority to require a State, as a condition of approval of the State

plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items." 20 U.S.C. § 6311(e)(1)(F). Central to the State's Complaint in this litigation is a linguistically similar general provision of the Act, which the State contends further constrains the Secretary's authority to shape a State's plan. That provision is commonly known as the Unfunded Mandates Provision, and it reads as follows:

> § 7907 Prohibitions on Federal Government and use of Federal funds
>
> (a) General prohibition
>
> Nothing in this chapter shall be construed to authorize an officer or employee of the federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.

20 U.S.C. § 7907(a). The language of this provision was apparently carried over from the Act's predecessor legislation. *See* Pub. L. No. 103-382, 108 Stat. 3518, 3906 (1994); Pub. L. No. 103-227, 108 Stat. 125, 186 (1994). This provision has already been the subject of one judicial opinion, *School Dist. of Pontiac v. Spellings*, 2005 U.S. Dist. LEXIS 29253, No. Civ. A. 05-CV-71535-D, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005), currently on appeal to the Sixth Circuit.

According to the State, the Unfunded Mandates Provision "requires full federal government funding for the provisions of the . . . Act." Compl. [doc. # 81] P5. Building on this interpretation, the State further reasons that, when federal funds are insufficient to cover a state's implementation of a statutory requirement, the Secretary is required by the Unfunded Mandates Provision to release the state from any obligation to comply with the insufficiently-funded obligation. Compl. [doc. # 81] PP46-47. Furthermore, the State claims, to the extent that the Secretary has a different interpretation of the Unfunded Mandates Provision, she is impermissibly altering the conditions under which the State agreed to accept federal funds, in violation of the Spending Clause. *See* Compl. [doc. # 81] P191.

The Secretary responds that the Unfunded Mandates Provision is not implicated here because it was *Congress*, not a federal official, which established the Act's testing regime, and the Unfunded Mandates Provision applies only to mandates imposed by federal officials, not by the Act itself. *See* Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 32; *see also School Dist. of Pontiac*, 2005 U.S. Dist. LEXIS 29253, 2005 WL 3149545 (concurring with the Secretary's interpretation of the Unfunded Mandates Provision). In addition, the Secretary contends that the State's interpretation of the Unfunded Mandates Provisions cannot logically be reconciled with other sections of the Act that detail explicitly when a state may be excused from the Act's testing obligations due to

insufficient federal funding. *See* Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 34-37. It is undisputed that overall federal funding has not in any year fallen below the express levels that the Act provides will relieve states of their testing obligations. *See* 20 U.S.C. § 6311(b)(3)(D). The Secretary argues that to interpret the Unfunded Mandates Provision as broadly as the State requests would render these other sections of the Act superfluous, in contravention of a "cardinal principle of statutory construction." Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 32 (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (internal quotation omitted)).

B. Connecticut's Approach to Academic Assessment

Insofar as the allegations regarding Connecticut's implementation of the Act are concerned, at this stage of the litigation, the factual allegations of the Complaint must be accepted as true. They are related below in accordance with that rubric.

For almost two decades before enactment of the Act, Connecticut had been administering its own system of statewide assessments. In 1986, the State began to assess the progress of its elementary and middle school students through the Connecticut Mastery Test ("CMT"), and in 1994, this system was extended to high school students with the Connecticut Academic Performance Test ("CAPT"). Compl.

[doc. # 81] P88. For over a decade, the State has also emphasized accountability, profiling and publishing assessment results for its school districts and schools on an annual basis, including breakdowns by demographic groups. *Id.* P95. According to the State, its efforts at accountability and assessment have paid substantial dividends: Connecticut's students are ranked among the highest achieving in the Nation and Connecticut has had success in narrowing the achievement gap for minority and economically-disadvantaged students. *See id.* P2. *But see* NAACP Motion at 2, Ex. A (citing a recent report where Connecticut "ranked dead last among states for its poor to non-poor achievement gap on the National Assessment of Educational Progress").

Connecticut's settled methodology for monitoring its students' progress differs in three key respects from the requirements of the Act. First, under Connecticut's educational assessment regime, the CMT and CAPT are administered in grades 4, 6, 8 and 10, and involve between 6 and 8.5 hours of testing on reading, writing, and mathematics. Importantly, the State's tests utilize not only multiple-choice questions, but also questions that require short essays and written explanations. *See* Compl. P88. Thus, for many years, the State has designed its testing regime and school curriculum around assessments that involve a substantial written component. In addition, at least some Connecticut schools have conducted "formative testing" in grades 3, 5, and 7. *See id.* P108, 111. Rather than a comprehensive, but lengthy,

annual test, formative testing is conducted multiple times during the year and is designed to "give teachers, students and parents immediate, frequent feedback." *Id.* P109.

Second, the State has a long-standing practice of making reasonable accommodations for its special education students, including offering them the option of being tested at their instructional level rather than at their grade level as required by the Act. *Id.* PP51, 92. "For example, a 10th grader who was being instructed at an 8th grade level for mathematics, pursuant to the student's individualized education plan, would be able to take the 8th grade CMT mathematics test." *Id.* P92.

Third, with respect to limited English proficiency students, the State's practice for two decades has been to permit these students three years of study in the United States before requiring them to take the State's assessments. By contrast, the Act requires these students to be tested within one year of entry into the United States, albeit allowing them to be tested in their native language for the first three years. *Id.* PP54, 93, 115.

Although Connecticut has been and remains in compliance with the Act as interpreted by the Secretary, it has repeatedly requested and been denied modification of the statutory testing requirements relating to annual testing, testing of ELL students, and special education students. In particular, the State has requested permission: (1) not to administer

the CMT and CAPT annually, but rather to continue administering the Connecticut tests in grades 4, 6, 8, and 10 and formative testing in grades 3, 5, and 7; (2) to exclude limited English proficiency students from the annual testing requirements for three years and then test them in English; and (3) to provide up to 2% of special education students with the option of being assessed at instructional level rather than at grade level. *Id.* PP10, 105. In addition to submitting these requests for waivers of the statutory testing requirements, the State submitted two proposals, which the Secretary construed and responded to as plan amendments. These two requests pertained only to ELL students and special education students; the State has never submitted a proposed plan amendment to use only formative testing in grades 3, 5, and 7. *Id.* PP148, 151, 154.

The State's Complaint cites a number of grounds for its requests for modification of the Act's testing requirements. The State's primary objection to each of the testing requirements is fiscal, *see id.* P14, though the State also hastens to add concerns about the efficacy of any testing regime it is required to adopt.[6] Fundamentally, Connecticut complains that strict adherence to the requirements of the Act

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[6] *See, e.g.*, Compl. [doc. # 81] 110 ("Formative testing is solidly grounded in scientifically based research, whereas there is no conclusive research that the summative testing required by the Secretary has any positive effect on student academic achievement.").

regarding annual testing, testing of ELL students, and testing of special education students will cost more than the federal government provides to the State for those purposes. Therefore, requiring compliance with the Act would breach the Unfunded Mandates Provision, which in the State's view requires the federal government to fully fund every requirement imposed by the Act. *Id.* 8.[7]

Through briefing and amendment of its Complaint, Connecticut's claims regarding the testing requirements of the Act have become clearer. With respect to the requirement of annual testing, the State's argument runs as follows: In the absence of permission to employ formative testing in grades 3, 5, and 7, the State will have to administer its CMT in each of grades 3 through 8, a task which both state and federal studies reveal will cost almost double the available federal funding. *Id.* P142; *see also* Def.'s Mem. Regarding Pls.' Am. Compl. [doc. # 50] Exs. A, B (state and federal studies, respectively). The parties agree that the Secretary has indicated – albeit only informally – that the State could comply with the Act if it continues its current practice of administering

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[7] When the Connecticut General Assembly amended the State's testing statutes in July 2003 to conform to the Act's testing requirements, it "expressly required that the costs attributable to the additional federal requirements of the . . . Act shall 'be paid exclusively from federal funds.'" Compl. [doc. # 81] 15 (quoting Conn. Gen. Stat. § 10-14n(g)). The General Assembly removed this restriction in 2006 after, the State claims, federal funds had been exhausted. *Id.* P16.

the CMT in grades 4, 6, 8, and 10 and introduces multiple-choice-only tests in grades 3, 5, and 7.[8] *Id.* P137. This approach would cost less than administering CMT tests annually because multiple-choice tests are less time-consuming, and therefore less expensive, to grade than the CMT with its written response component. Indeed, one study referred to and relied on in the State's Complaint indicates that federal funding would be more than sufficient to cover the State's testing obligations under the Act if the State abandoned its CMT tests and adopted multiple-choice-only testing in each grade. *See* Def.'s Mem. Regarding Pls.' Am. Compl. [doc. # 50] Ex. B at 19 (United States General Accounting Office, GAO-03-389, *Title I: Characteristics of Tests Will Influence Expenses; Information Sharing May Help States Realize Efficiencies* (May 2003)); *see also* Compl. [doc. # 81] PP77, 78 (citing the GAO report). The State does not address the possibility of switching to a multiple-choice-only regime, but rather intimates (rather artfully in the Court's view) that federal funding might still be insufficient to cover the State's costs, even if the State elected to use multiple-choice-only testing. *See* Compl. [doc. # 81] PP8, 142, 173.

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[8] While the Act, since 2005, requires annual testing in grades three through eight, the Act does not require testing in ninth grade, and only requires one annual test to be administered between grades ten and twelve. *See* 20 U.S.C. § 6311(b)(3)(C)(v), (vii).

In any event, the State expressly alleges that alternating the CMT with multiple-choice testing, as the Secretary has suggested, is not a solution to its fiscal concerns for three reasons: First, the State has no formal assurance that such a plan would make it through the statutorily-mandated peer-review process or be approved by the Secretary. *Id.* P139. Second, and connected with the State's concern about peer review, the State asserts that administering tests without any written component would be inconsistent with best practices in education, and would potentially be in violation of the statutory requirement that assessments be "consistent with relevant, nationally recognized professional and technical standards," 20 U.S.C. § 6311(b)(3)(C)(iii), as well as the Act's declared purpose of improving student achievement. *See* Compl. [doc. # 81] PP110, 139, 161. According to the State, its preferred alternative-namely, CMT testing in grades 4,6 8, and 10 and formative testing in grades 3, 5, and 7 – "is solidly grounded in scientifically based research, whereas there is no conclusive research that the [multiple-choice] testing required by the Secretary has any positive effect on student academic achievement." *Id.* PP110. Third, the State contends that administering CMT tests in grades 4, 6, 8, and 10, and multiple-choice tests in grades 3, 5, and 7, would in any event require the State to spend at least $ 4 million above and beyond the funds supplied by the federal government, in violation of the Unfunded Mandates Provision. By contrast, the State argues, its proposal to alternate the CMT with

formative testing would be fully covered by the available federal funds. *Id.* PP112, 142, 173.

With regard to its request for a three-year exemption for limited English proficiency students, the State asserts that the sheer number (150) of different native languages spoken by students in its schools makes introduction of native-language tests for the first three years (as the Act allows) prohibitively expensive. *Id.* PP114. Although the statute would allow the State to test its ELL students immediately using its standard English-language tests (and thus at no extra cost to the State), the State rejects this option on the following grounds: (1) that students learning English require at least three years to become proficient; (2) that the written-response format of its tests requires proficiency; and (3) that "testing ELL students at a time and in a format when they cannot reasonably be expected to understand the questions undermines the goals and purposes of the Act[,] . . . violates the requirement that 'reasonable accommodations' be made for the assessments of . . . ELL students," and "is unsupported by significant scientifc research." *Id.* PP53, 131, 162. Furthermore, the State believes that the choice between immediate tests in English and development of myriad foreign-language tests unfairly confronts it with the "harsh dilemma of either spending millions of dollars of State funds to create, administer, and grade native language tests . . . or suffer the series of escalating consequences when its . . . schools fail to make their [Annual Yearly Progress] because their ELL students

cannot understand the English language tests." *Id.* P165.

In support of its request to be allowed to offer 2% of its special education students the option of being tested at instructional level rather than grade level, the State concedes that the choice is "cost-neutral."[9] *Id.* P117. However, the State maintains that (1) "assessing a special education student at instructional level rather than grade level is a reasonable accommodation," *id.* P118; (2) that the adjustment is required in order to avoid testing special education students "on topics that they have not been taught and that their [Individualized Education Plans] direct that they not be taught at that time," *id.* P131; and (3) that failing to offer this reasonable accommodation would violate "the purposes and goals of the Act," *id.* The Secretary has recently announced that states may test up to an additional 2% of their special education students using alternative assessments, in addition to the 1% exception already provided for the most cognitively challenged special education students. *Id.* PP128, 129. The State observes, however, that the substitution of instructional-level tests for grade-level tests does not qualify as administering alternative assessments for purposes of the Secretary's new policy. *Id.* P150. Rather, the Secretary's

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[9] Because the State only requests a waiver for 2% of its special education students, *see* Compl. 105(c), the Court presumes that the remaining special education students are being tested at grade level in compliance with the Act.

new policy anticipates the development of "an entirely new testing regime for special education students for each grade to be tested." *Id.* P150. According to the State, even taking advantage of the partial exception from the default statutory testing requirement embodied in the Secretary's new policy would require the expenditure of $ 1.5 million dollars per year in State funds for the development and administration of the alternate assessment regime for special education students. *Id.* PP130, 150. Nevertheless, during the summer of 2005, Connecticut requested and received permission to test 2% of its special education students under the new policy of alternative assessment. *Id.* P149. The Complaint does not indicate whether the State has implemented the alternative assessment method for the 2% of the State's special education students.

D. The Secretary's Response to Connecticut's Requests

The State submitted applications for waivers and/or plan amendments regarding the previously discussed testing requirements in January, March, and May of 2005.[10] *Id.* PP105, 114, 117. The Secretary first denied the requests made in the State's written

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[10] Nearly all of the correspondence referred to between the Secretary and the State may be found on the State's website at http://www.state.ct.us/sde/nclb/Correspondence/index.html.

application in February 2005.[11] *Id.* PP120, 121. The Secretary denied the State's waiver requests for a second time in May 2005, after meeting with Connecticut's Commissioner of Education to discuss the reasons for Connecticut's requests as well as the State's plans for a lawsuit challenging the Secretary's implementation of the Act. *Id.* PP134, 145. The day after the meeting between the parties, the Deputy Secretary of Education orally suggested that Connecticut administer multiple-choice tests in grades 3, 5, and 7, in order to save the expense of extending the CMT to those grades. *Id.* P137. The State responded to this suggestion in writing and explained its objections to introducing multiple-choice testing (as discussed above). The Secretary again denied the State's requests, this time suggesting that the State consider diverting federal funds that it currently allocated to

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[11] The Secretary sought additional information about, but did not deny, one of the State's waiver requests to conduct "cohort analysis," whereby the State would compare the performance of a specific group of students over an extended period of time, as opposed to comparing students at a given grade level to a new group of students at that grade level the following year. *See* Compl. [doc. # 81] P105(b); Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 14 n.4. The Secretary later reported that she intended to consider such requests as part of a pilot program "to explore the feasibility of growth models as accountability mechanisms." *See* Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 14 n.4 (citing Press Release, U.S. Department of Education, Secretary Spellings Announces Growth Model Pilot (Nov. 18, 2005), http://www.ed.gov/print/news/pressreleases/2005/11/11182005.html).

nontesting programs to cover any additional costs of testing. *Id.* P145.

The Secretary's third and final denial of the State's requests for modification of the testing requirements came in June 2005. *Id.* P149. Although on this occasion the Secretary construed Connecticut's requests regarding ELL and special education students as requests for plan amendments rather than as waiver requests, *id.* P151, the Secretary did not offer the State an opportunity to revise the amendments or a hearing at which to discuss the amendments prior to issuing her denial of the requests, *id.* P152, to which the State argues it was entitled under 20 U.S.C. § 6311(e)(1)(E).

According to the State, the Secretary's principle [sic] reason for denying the State's requests is that the requirement of annual testing is fundamental to the successful implementation of the Act and will not be waived. *Id.* PP123, 124, 159. The Secretary offered a more specific rationale in her February 28, 2005 letter to the State. In that letter, the Secretary explained that national data indicated a substantial achievement gap between black, Hispanic, and white students in Connecticut, which necessitates annual testing in each grade "to determine if these gaps are being closed, and, if they are not, adjustments must be made." Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 11 (citing Letter from Secretary Spellings to Commissioner Sternberg (Feb. 28, 2005) at 1). The Secretary also denied the State's waiver requests related to ELL and special education students after

noting substantial achievement gaps between those categories of students and others in Connecticut. *See id.* at 12-13. Though she denied the waiver requests, the Secretary alluded to future review of her stated policies with respect to ELL and special education requirements. *See id.*

Both parties agree that the State has been in compliance with all of the requirements of the Act as interpreted by the Secretary throughout the dispute. Compl. P4. Due to the State's compliance, there has been no need for the Secretary to bring an enforcement action against the State for violating any provision of the Act.

IV.

A. Count I – Unfunded Mandates Provision

In Count I of the Complaint [doc. # 81], the State seeks a declaratory judgment to clarify the meaning of the Unfunded Mandates Provision. The State alleges that the Secretary has violated the Unfunded Mandates Provision by requiring the State to expend funds in order to comply with the Secretary's interpretation of the Act. Count I challenges the Secretary's interpretation of three specific sections of the Act: (1) the requirement that special education assessments be conducted at grade level rather than instructional level, Compl. [doc. # 81] PP117, 129, 131; (2) the requirement that ELL students receive mathematics assessments in their first year in the country and reading assessments in the following

year, *id.* 105, PP115, 131; and (3) the requirement that non-formative annual testing occur in every grade, *id.* P112. The State seeks a declaratory judgment that, in accordance with the Unfunded Mandate Provision, the State cannot be required to spend its own funds to comply with the Act, as interpreted by the Secretary. *See id.* P186.

The Secretary raises a number of threshold objections to the Court's consideration of the merits of the State's claims in Count I. The Court will address each objection in turn.

1. Standing

The Court must first consider the threshold question of justiciability and in particular, whether the State has standing to assert its claims in Count I. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006) (citing *Warth*, 422 U.S. at 498). As the Supreme Court has explained:

> This 'irreducible constitutional minimum' of standing requires: (1) that the plaintiff have suffered an 'injury in fact' – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the

> court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (citing *Defenders of Wildlife*, 504 U.S. at 560-61). For purposes of determining standing, the Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501. According to the Secretary, the State lacks standing for two reasons. First, the State is currently in compliance with the Act and has suffered no injury in fact because no federal funds have been withheld from the State. *See* Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 27. The State concedes that it is currently in compliance with the Act and that there is no immediate risk of funds being withdrawn. *See* Compl. [doc. # 81] P9. Second, in a related vein, the Secretary argues that all of the State's alleged injuries are self-inflicted and therefore do not qualify as an injury in fact because the State can comply with the annual testing requirements, as construed by the Secretary, without expending more than the federal funds received by the State under the Act. *See* Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 23-24, 28 (citing *Pennsylvania v. New Jersey*, 426 U.S. 660, 664, 96 S. Ct. 2333, 49 L. Ed. 2d 124 (1976) (holding that plaintiff-states lacked standing to challenge income taxes imposed on their residents by other states, where the proximate cause of the plaintiff-states' injury was the decision of their

own legislatures to grant tax credits for income taxes paid to other states)). In effect, the Secretary says that the State wants to employ testing methods that exceed what is required by the Act and then blame the federal Government for failing to pay for more than the Act itself requires.

The Secretary's arguments are not without force. However, the Court need not determine whether the risk of having future funding withdrawn is imminent enough to constitute an injury in fact under standing principles because a more immediate injury exists. The State alleges in its Complaint that the *current* federal funds it receives under the Act fail to cover the costs of administering the tests required by the Act. Thus, in paragraph 8 of its Complaint, the State expressly alleges as follows: "Federal funding to Connecticut for [the Act's] mandates is substantially less than the costs attributable to the federal requirements of the . . . Act." Compl. [doc. # 81] P8. Whether the State will be able to establish the truth of this assertion – something the Secretary hotly disputes – is irrelevant, for at this preliminary stage of the proceedings, the Court must accept the allegations of the State's Complaint as true. As the Second Circuit has recently explained,

> On a motion to dismiss for lack of standing, we presume the general factual allegations embrace those facts necessary to support the claim, and are constrained not only to accept the truth of the plaintiffs' jurisdictional allegations, but also to construe

> all reasonable inferences to be drawn from those allegations in plaintiffs' favor.

Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 2006 U.S. App. LEXIS 23170, 2006 WL 2588005, at *5 (2d Cir. Sept. 8, 2006) (citing *Defenders of Wildlife*, 504 U.S. at 561; *Warth*, 422 U.S. at 501-02).

If the facts alleged by the State are true, as the Court must accept at this point, then the State is currently suffering an injury in fact, and there is a causal connection between the government conduct complained of and the injury alleged. *See* Compl. [doc. # 81] P14 ("By denying Connecticut's waiver requests, the Secretary is requiring Connecticut to expend substantial sums in excess of federal funding to comply with the [Act's] mandates as interpreted by the Secretary and the Act."); *Brooklyn Legal Servs.*, 2006 U.S. App. LEXIS 23170, 2006 WL 2588005, at *7 ("Whether a plaintiff has standing will 'depend[] considerably upon whether the plaintiff is himself an object of the [government action] at issue,' and 'if he is, there is ordinarily little question that the action . . . has caused him injury.'") (quoting *Defenders of Wildlife*, 504 U.S. at 561-62). Furthermore, if current funding is inadequate, a declaratory judgment prohibiting the Secretary from requiring the State to spend additional funds to comply with the Act would likely redress the State's claimed injury. Compl. [doc.

81] P186. The State has therefore met the required elements of standing.[12]

2. Jurisdiction Over a Pre-Enforcement Challenge

The second threshold issue the Court must address is whether the Court has jurisdiction to entertain this pre-enforcement challenge to the Secretary's implementation of the Act. The word "pre-enforcement" is used because, at this point, the State continues to comply with the Act. Compl. [doc. # 81] P9. Moreover, the Secretary has not declared the State to be in violation of any provision of the Act, and she has not taken any steps, preliminary or otherwise, to enforce the Act or withhold federal funds that the State receives under the Act. Therefore, the State seeks a judicial determination regarding the Secretary's interpretation of the Act even though, to date, the Secretary has taken no concrete action in support of her interpretation, other than the denials of waivers and plan amendments which are the subjects of Counts III and IV, not Count I. In short, the State asks the Court to tell it and the

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[12] Having concluded that the State has standing, the Court does not reach the question of whether the Connecticut General Assembly, which has joined as a plaintiff in this action, also has standing. *Cf. U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 719, 108 L. Ed. 2d 701, 110 S. Ct. 1428 (1990) (finding it did not have to determine whether a second complainant had standing after finding that the first complainant did).

Secretary who is right regarding their respective interpretations of the Act before either of them has taken any formal action based upon their respective interpretations. According to the Secretary, "this pre-enforcement challenge represents an impermissible end-run around the mandatory administrative and judicial review scheme set forth in the governing statute." Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 14. While conceding that this is a close question, the Court agrees with the Secretary.

Whether a court can entertain a pre-enforcement action, such as the one at issue here, is determined under the framework developed by the Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 114 S. Ct. 771, 127 L. Ed. 2d 29 (1994). In *Thunder Basin*, the Mine Safety and Health Administration adopted a regulation requiring the posting of certain information regarding miners' representatives. Rather than post the information required by the regulation or challenge the regulation through the statutory review process provided by the Federal Mine Safety and Health Amendments Act of 1977 (the "Mine Act"), a mine operator filed a lawsuit in district court seeking to enjoin the agency from enforcing the regulation against the company. The company argued that pre-enforcement review of the regulation was necessary because the company would be irreparably harmed if it complied with the regulation and would face stiff civil penalties if it did not. The Supreme Court noted that the Court of Appeals dismissed the case because, in part, to hold otherwise "would permit

preemptive strikes that could seriously hamper effective enforcement of the [Mine] Act, disrupting the review scheme Congress intended." *Id.* at 206 (quoting *Thunder Basin Coal Co. v. Martin,* 969 F.2d 970, 975 (10th Cir. 1992)).

The Supreme Court agreed with the Tenth Circuit's decision, holding that the district court lacked subject matter jurisdiction to entertain the mine operator's challenge. The Supreme Court began by enunciating a test for determining whether to permit such pre-enforcement review: "In cases involving delayed judicial review of final agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is 'fairly discernible in the statutory scheme.'" *Id.* at 207. And "whether a statute is intended to preclude initial judicial review," the Supreme Court stated, "is determined from the statute's language, structure, and purpose, its legislative history . . . and whether the claims can be afforded meaningful review." *Id.* (citation omitted). Reviewing the Mine Act in detail, the Court held that "the Mine Act's comprehensive enforcement structure, combined with the legislative history's clear concern with channeling and streamlining the enforcement process, establishes a fairly discernible intent" to preclude judicial review outside the administrative and judicial review process provided in the Mine Act itself. *Id.* at 215. While acknowledging the presumption that Congress does not intend to prohibit all judicial review, the Court held that the presumption of judicial review was not

applicable, because the Mine Act did provide for judicial review, just not before completion of the administrative process contemplated by the Mine Act. *Id.* at 207 n.8.

The No Child Left Behind Act itself does not include an enforcement scheme analogous to that provided in the Mine Act. However, as the Secretary points out, *see* Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 16-18, GEPA provides procedures that govern the Secretary's enforcement of the requirements of the Act, and GEPA does contain a "comprehensive enforcement scheme" analogous to that of the Mine Act. *Compare Thunder Basin*, 510 U.S. at 216 ("We conclude that the Mine Act's comprehensive enforcement structure . . . establishes a 'fairly discernible' intent to preclude district court review in the present case.") (citing 30 U.S.C. § 816(a)(1) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain a review of such order in any United States court of appeals. . . .")) *with* 20 U.S.C. § 1234g(a)-(b) (describing that any recipient of federal funds under the Act who would be "adversely affected by a final agency action" and who "desires judicial review" of the agency's decision shall "file with the United States Court of Appeals . . . a petition for review of such action."). Both GEPA and the Mine Act require the agency to provide notice of an alleged violation of statutory or administrative requirements to the alleged offender. *Compare* 30 U.S.C. § 814(a) (Mine Act) *with* 20 U.S.C. § 1234d(b) (GEPA). Both also provide for a hearing before an

Administrative Law Judge, subject to a discretionary review by a Commission, in the case of the Mine Act, or the Secretary, in the case of GEPA.[13] *Compare* 30 U.S.C. § 823(d) (Mine Act) *with* 20 U.S.C. § 1234d(c), (f) (GEPA). Moreover, under both statutes, the agency's decision following that discretionary review is considered to be a "final agency action," and it may be appealed to the appropriate United States Court of Appeals. *Compare* 30 U.S.C. § 816(a)(1) (Mine Act) *with* 20 U.S.C. § 1234g(a)-(b) (GEPA). Thus, both statutes allow for "meaningful and adequate opportunity for judicial review" after final agency action. *Bd. of Govs. of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43, 116 L. Ed. 2d 358, 112 S. Ct. 459 (1991). The court of appeals must then uphold the agency's factual findings if supported by substantial evidence in the record. *Compare* 30 U.S.C. § 816(a)(2) (Mine Act) *with* 20 U.S.C. § 1234g(c) (GEPA). Finally and importantly, both GEPA and the Mine Act provide that the agency cannot implement any enforcement action until a court has completed its review.

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[13] The State claims that the "most significant[]" difference between the Mine Act and GEPA is that GEPA lacks the independent commission present in the Mine Act to review ALJ decisions prior to an appeal to the Court of Appeals. *See* State's Opp'n to the Sec.'s Mot. to Dismiss [doc. # 25] at 17. The Supreme Court made clear, however, that the existence of the Commission was not determinative, for the Court stated that, even if the Commission did not exist, "petitioner's statutory and constitutional claims here can be meaningfully addressed in the Court of Appeals." *Thunder Basin*, 510 U.S. at 215.

Compare 30 U.S.C. §§ 816, 820(i) *with* 20 U.S.C. § 1234g(a) (GEPA).[14]

Furthermore, while the Supreme Court in *Thunder Basin* did not rely heavily on the legislative history of the Mine Act in considering whether it precluded pre-enforcement challenges, *see Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin.*, 376 F.3d 239, 243 n.2 (4th Cir. 2004), the legislative history of GEPA, like that of the Mine Act, suggests a "concern with channeling and streamlining the enforcement process." *Thunder Basin*, 510 U.S. at 216. For example, the House Report for GEPA stated that the enforcement scheme was designed to "consolidate[ ] most of the provisions relating to enforcement and judicial review in existing state-operated programs, and . . . establish[ ] a comprehensive system for enforcement by the [agency] of the requirements relating to education programs." H.R. Rep. No. 95-1137, at 141 (1978). Allowing the State to challenge the Secretary's interpretation of the Unfunded Mandates Provision prior to any agency action against the State would undermine the "comprehensive system

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[14] The Court recognizes that under the Act, the Secretary may withhold administrative funds under 20 U.S.C. § 6311(g)(2) with no express provision for judicial review. However, the administrative funds constitute, at most, 1% of the Title I funds the State receives from the federal Government, *see* 20 U.S.C. § 6304(a), or approximately $ 3 million, *see* Compl. [doc. # 81] 65, assuming the Secretary were to initiate such an action. Of course, no such withholding has occurred or been threatened to date.

for enforcement" provided by Congress. *See, e.g., Doe v. F.A.A.*, 432 F.3d 1259, 1263 (11th Cir. 2005) ("The [complainants] simply cannot avoid the statutorily established administrative-review process by rushing to the federal courthouse for an injunction preventing the very action that would set the administrative-review process in motion."); *Great Plains Coop v. Commodity Futures Trading Comm'n*, 205 F.3d 353, 355 (8th Cir. 2000) ("Great Plains's complaint is an impermissible attempt to make an 'end run' around the statutory scheme. . . . It would create two avenues of judicial review and would allow the plaintiff to short-circuit the administrative review process and the development of a detailed factual record by the agency.").[15]

The Supreme Court in *Thunder Basin* also explained that there are pragmatic reasons to insist on

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[15] The Supreme Court considered the jurisdiction of Article III courts in the context of a GEPA claim in *Bell v. New Jersey*, 461 U.S. 773, 103 S. Ct. 2187, 76 L. Ed. 2d 312 (1983). In *Bell*, the plaintiffs brought their claim directly to the court of appeals rather than a district court. Therefore, the issue before the Supreme Court was not whether a district court would have jurisdiction under the enforcement scheme, but rather whether the agency's action constituted a "final agency action" that was subject to judicial review under GEPA. *Bell* noted, however, that each section of GEPA allowing for judicial review "includes a subsection dealing with finality and suggesting that only a 'decision' of the [agency] is subject to review." *Id.* at 778. *Bell's* analysis of the comprehensive enforcement mechanism provided by GEPA lends further support to the Court's conclusion that the Act does not allow for pre-enforcement judicial review.

compliance with the statutory enforcement mechanism beyond simply adhering to the dictates of Congress regarding the scope of district court jurisdiction. The statutory review process is the means by which "agency expertise is brought to bear" on the issues raised. *Thunder Basin*, 510 U.S. at 215. That rationale resonates in this case as well. As the State has made clear, its statutory and constitutional concerns in this case are principally fiscal in nature. As a consequence, determining whether the Secretary correctly interpreted and applied the specific provisions of the Act to the State's proposals involves not only an analysis of the statute itself but also a factual and technical assessment of the State's testing programs and its claims regarding the expense of the various alternatives that have been proposed. For example, deciding how much a given testing program costs to implement, how much money the State spent on testing prior to any additional requirements imposed by the Secretary under the Act, whether the State is using federal funds to supplant or supplement state funding, and to what extent federal funds successfully or unsuccessfully cover the cost of implementation are all questions that would benefit from a well-developed factual record and the agency's expertise in the area of educational funding. *See, E. Bridge, LLC v. Chao*, 320 F.3d 84, 89 (1st Cir. 2003) ("Committing initial review to the agency is often sensible policy. Because the administrative agency may possess greater expertise with respect to the organic statute, agency review can be more informed and thus more expeditious, and scarce judicial

resources can be conserved for other areas of pressing concern.").

Insisting on compliance with the review process provided by GEPA will also require the Secretary to a take a formal position regarding the testing requirements and the Unfunded Mandates Provision. Right now, all the Court has to consider is the Secretary's informal determination that Connecticut's current alternate-year testing scheme supplemented by multiple-choice tests in the other years would satisfy the Act, but there is good reason to insist that the Secretary take a formal position on such issues. After all, it is one thing to file a brief on hypothetical questions; it is quite another for the Secretary to take the extraordinary step of withholding much needed federal funds from a state whose congressional delegation and citizens would surely not take too kindly to such an act. Perhaps the Secretary will take no enforcement action; perhaps she will withhold only a modest amount of federal funds; perhaps the State will back off of its position. In the Court's view, there is great benefit in allowing both the political, as well as the administrative, process to run its course in this way. Otherwise, every time a state gets into a disagreement with the Secretary, the state will be encouraged to run to federal court to learn who is right even before that disagreement has evolved into any concrete action.

Candor requires the Court to acknowledge that certain facts weigh against its conclusion regarding pre-enforcement review, though on balance, they do

not outweigh the evidence of Congress's intent to preclude pre-enforcement review. For one, Congress certainly could have been more explicit in precluding pre-enforcement review. *See MCorp*, 502 U.S. at 44 (citing the relevant statute in the case, 12 U.S.C. § 1818(i)(1), which stated that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [agency] notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order"). Explicitly precluding judicial review, however, is not a condition for finding statutory preclusion of preenforcement challenges. After all, there was no such language in the Mine Act. All that is required is that congressional intent be "fairly discernible in the statutory scheme." *Thunder Basin*, 510 U.S. at 207 (internal quotation omitted). Other courts have concluded that a statute precluded pre-enforcement review even without an explicit instruction from Congress. *See, e.g.*, *Nat'l Taxpayers Union*, 376 F.3d at 242-43 (finding statutory preclusion without express language); *Great Plains Coop*, 205 F.3d at 355 (same); *Reich v. Manganas Painting Co. (In re Establishment Inspection of Manganas Painting Co.)*, 104 F.3d 801, 803 (6th Cir. 1997) (same); *see also Bell*, 461 U.S. at 777-78 (alluding to the fact that no judicial review is available under GEPA until there has been final agency action even though there is no explicit preclusion provision).

The State also points out, and the Court agrees, that GEPA's enforcement scheme does not "channel"

all review in a manner identical to the Mine Act. *See Thunder Basin*, 510 U.S. at 216; State's Opp'n to the Sec.'s Mot. to Dismiss [doc. # 25] at 15-17. For example, the Secretary asserts that the suspension of state administrative funds under the Act is not subject to judicial review under GEPA, *see* Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18] at 18 n.9. And in her most recent filing, the Secretary conceded that her denial of a state's plan amendment could be reviewed by a district court under the APA so long as her decision constituted a final agency action under 5 U.S.C. § 702. *See* Def.'s Mem. Regarding the State's Second Am. Compl. [doc. # 83] at 2-3, 16-23; *Cf. Rocky Mountain Radar, Inc. v. F.C.C.*, 158 F.3d 1118, 1122 n.7 (10th Cir. 1998) (finding no statutory preclusion after noting that the statute granted district courts jurisdiction over certain pre-final agency action claims in addition to the typical circuit court jurisdiction). In *Thunder Basin*, by contrast, all judicial review was channeled to the courts of appeal. On balance, however, the Court does not believe that these relatively minor differences from *Thunder Basin* undermine the Court's conclusion that the overall language, structure, and legislative history of GEPA fairly reflect an intent to preclude the type of pre-enforcement action brought by the State in this case. *See, e.g.*, *Nat'l Taxpayers Union*, 376 F.3d at 242 (finding statutory preclusion even though district courts had jurisdiction over some claims while circuit courts had jurisdiction over others).

Finally, the State argues that it is a sovereign, not a company as in *Thunder Basin* and many other post-*Thunder Basin* cases, and that as a sovereign it should not be forced to violate the Secretary's commands merely to obtain a judicial ruling on the validity of the Secretary's arguments. This argument has considerable rhetorical appeal, but it fades upon analysis. After all, GEPA is a statute that concerns states, not companies, and Congress knew that when it enacted GEPA. Yet Congress did not provide any pre-enforcement review mechanism in GEPA to alleviate states of the affront of having to violate the Secretary's commands before obtaining judicial review. To the contrary, GEPA provides a comprehensive enforcement scheme that contemplates judicial review only *after* the agency has determined that a state has violated the Act. *See Bell*, 461 U.S. at 777-78.

Concluding, as the Court does, that GEPA precludes pre-enforcement challenges such as that launched by the State in Count I does not end the Court's inquiry. For the Supreme Court in *Thunder Basin* held that, despite the statutory preclusion for claims covered under the statute, district courts would nevertheless maintain jurisdiction "over claims considered 'wholly collateral' to a statute's review provisions and outside the agency's expertise . . . particularly where a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin*, 510 U.S. at 212 (citations and internal quotation omitted). More recently, the First Circuit clarified this

exception to *Thunder Basin*, stating that "to unsettle this presumption of initial administrative review – made apparent by the structure of the organic statute – requires a strong countervailing rationale." *E. Bridge, LLC*, 320 F.3d at 89 (citing *Thunder Basin*, 510 U.S. at 212-17). The First Circuit listed the specific circumstances under which the Supreme Court has previously made exceptions to *Thunder Basin* preclusion. These circumstances include: "situations where plaintiffs will effectively receive no review at all, where the administrative process is fundamentally flawed because of a pattern and practice of administrative agency abuse, where the agency's behavior is utterly lawless, and where further administrative exhaustion is deemed futile." *Id.* (footnotes omitted).

None of these exceptions apply here. First, at a general level, the disagreement over the Secretary's interpretation and implementation of the Unfunded Mandates Provision is not "wholly collateral" to the administrative enforcement scheme. As rehearsed above, reviewing the costs and efficacy of implementing programs under the Act falls squarely within the expertise of the Secretary and the enforcement mechanisms provided by Congress. *See Sturm, Ruger & Co. v. Chao*, 353 U.S. App. D.C. 245, 300 F.3d 867, 874 (D.C. Cir. 2002) (finding a claim was not "wholly collateral" since it "require[s] interpretation of the parties' rights and duties under the Act and its regulations, and therefore fall[s] squarely within the Commission's expertise") (internal

quotations omitted). The Supreme Court's words in *Thunder Basin* apply equally here: "Petitioner's statutory claims at root require interpretation of the parties' rights and duties under [the Mine Act and regulation], and as such arise under the Mine Act and fall squarely within the [agency's] expertise." *Thunder Basin*, 510 U.S. at 214.

The State argues that two of the exceptions specified by the First Circuit in *Eastern Bridge* apply here. First, the State claims that the penalty the State faces for violating the Act-the potential loss of all Title I funding, totaling hundreds of millions of dollars-is so onerous that it will be forced to continue to comply with the Act and therefore will be deprived of all judicial review. *See* State's Supplemental Br. in Supp. of Def.'s Mot. to Dismiss on Matters Raised During the Apr. 28, 2006 Oral Argument [doc. # 64] at 2-10. In this regard, the Court notes that the Second Circuit has held that "any legislative scheme that denies subjects an opportunity to seek judicial review of administrative orders except by refusing to comply, and so put themselves in immediate jeopardy of possible penalties so heavy as to prohibit resort to that remedy, runs afoul of the due process requirements of the Fifth and Fourteenth Amendments." *Schulz v. Internal Revenue Serv.*, 413 F.3d 297, 303 (2d Cir. 2005) (internal quotation and citation omitted).[16] Second, the State contends that further

[16] The Secretary argues that due process protections may only be claimed by private entities and not states-that is, that a

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administrative exhaustion would be futile because the Secretary has made her position on the Act clear and will not change her mind. *See generally* State's Supplemental Br. in Supp. of Def.'s Mot. to Dismiss on Matters Raised During the Apr. 28, 2006 Oral Argument [doc. # 64]. The Court disagrees with both arguments.

The State's argument that the potential penalties for violating the Act are so onerous that the State will be forced to comply with the Secretary's interpretations has been severely, if not completely, undermined by the Secretary's concession that her final decisions on plan amendments may be reviewed by a district court under the APA. *See* Def.'s Mem. Regarding the State's Second Am. Compl. [doc. # 83] at 2-3, 16-23. The Secretary has stated that submission of a plan amendment does not void the existing plan, *see* Def.'s Mem. Regarding Issues Raised at Apr. 28, 2006 Conf. [doc. # 65] at 18, so the State may submit proposed plan amendments (for

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state is not a "person" within the meaning of the Due Process Clause of the Fifth Amendment. *See* Def.'s Mem. Regarding Issues Raised at Apr. 28, 2006 Conf. [doc. # 65] at 13. Since the State has a means of raising its claims and also complying with the statute, there is no due process concern here. Therefore, the Court need not and does not address the Secretary's argument. Even if the Court were to find a colorable due process claim and conclude that the State could raise such a claim, the Secretary has agreed not to suspend program funds, in this case only, without holding an administrative hearing under GEPA. *See id.* at 16. Thus, any suspension would be subject to judicial review before becoming effective. *See* 20 U.S.C. § 1234g(a).

example, omitting non-formative testing every other year) without risking the loss of any Title I program funds. Because the refusal to approve a plan amendment may be reviewed by a district court without the risk of the State losing federal funding, the State is able to continue to comply with the Act while at the same time seeking judicial review of its claims regarding the Act, albeit in the context of an appeal of a denial of a proposed plan amendment.[17] As was true in *Thunder Basin*, "the dilemma of either obeying the law and thereby forgoing any possibility of judicial review, or risking 'enormous' and 'severe' penalties, effectively cutting off all access to the courts. . . . does not exist here. . . ." *Thunder Basin*, 510 U.S. at 221 (Scalia, J., concurring) (citations omitted).

The State's futility arguments are equally unavailing. The State reasons that it would be futile for the Court to require final agency action, since the Secretary's "legal interpretation of the Unfunded Mandates Provision is well-known and directly contrary to the State's view. Pursuing a plan amendment on the alternate grade testing would simply unduly delay the inevitable district court adjudication of the State's claims." State's Supplemental Br. in Supp. of

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[17] At this stage, the Court makes no determination of precisely what claims the parties may raise as part of a review of a denial of a plan amendment, as that will necessarily depend upon the administrative record, the nature of the amendment sought, the arguments advanced in support, and the basis for denial of the amendment. *See infra* Section IV.D.

Def.'s Mot. to Dismiss on Matters Raised During the Apr. 28, 2006 Oral Argument [doc. # 64] at 13 (citations omitted). To support this proposition, the State relies on *Bd. of Ed. of City School Dist. of N.Y. v. Harris*, 622 F.2d 599 (2d Cir. 1979). *In Harris*, the court stated "that where resort to the agency would plainly be unavailing in light of its manifest opposition or because it has already evinced its 'special competence' in a manner hostile to petitioner, courts need not bow to the primary jurisdiction of the administrative body." *Id.* at 607. However, the court in *Harris* reached that conclusion only after finding that both parties perceived "the issue presented as a purely legal one . . . and submitted the matter upon a stipulated set of facts and upon their respective briefs." *Id.* Here, in contrast, the facts are hotly disputed and the Court has concluded that judicial review would be enhanced by forcing the parties to take concrete positions at the administrative level and by development of a full administrative record. Therefore, the Court believes that requiring formal and final agency action, even if the ultimate results can be surmised, is not at all futile.

In sum, the Court concludes that it lacks subject matter jurisdiction to entertain this pre-enforcement declaratory judgment action to determine whether the Secretary's construction of the Unfunded Mandates Provision is consistent with the Act, as the State has sought in Count I.

3. Prudential Ripeness

Even if the Court were wrong on whether the Act allows pre-enforcement judicial review, the Court would nonetheless lack jurisdiction to entertain the claims asserted in Count I because the Court agrees with the Secretary that those claims are not ripe for judicial determination. The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725, 733 n.7, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997). In its prudential form, ripeness is one of the means courts have developed to further what Professor Alexander Bickel termed the "passive virtues" – a willingness in appropriate circumstances to decline or defer jurisdiction where prudence counsels avoidance. *See* Alexander M. Bickel, The Least Dangerous Branch 111-198 (1962); Alexander M. Bickel, *The Supreme Court 1960 Term Foreward: The Passive Virtues*, 75 Harv. L. Rev. 40, 58-64 (1961). As Judge Calabresi has explained, "prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003).

The Second Circuit has explained that at the heart of the prudential ripeness doctrine is the question of "whether [the court] would benefit from

deferring initial review until the claims [the court is] called on to consider have arisen in a more concrete and final form." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (noting that the ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements"). Determining whether a case satisfies the prudential ripeness doctrine entails a twofold inquiry requiring a court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court considerations." *Murphy*, 402 F.3d at 347 (quoting *Abbott Labs.*, 387 U.S. at 149). The "fitness" portion of the inquiry "requires a weighing of the sensitivity of the issues presented and whether there exists a need for further factual development," while the "hardship" element requires a "gaug[ing of] the risk and severity of injury to a party that will result if the exercise of jurisdiction is declined." *Murphy*, 402 F.3d at 347. "Both aspects of the inquiry involve the exercise of judgment, rather than the application of a black-letter rule." *Nat'l Park Hospitality Assoc. v. Dept. of the Interior*, 538 U.S. 803, 814, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (Stevens, J., concurring).

The claim asserted in Count I satisfies neither element of the prudential ripeness test. Insofar as fitness is concerned, Count I entails statutory construction issues, and thus legal issues that are

ordinarily fit for judicial determination. *See Abbott Labs.*, 387 U.S. at 149. However, as discussed above, the Court believes that further development of the record would assist a court in deciding the questions presented in Count I. *See, Motor Vehicle Mfrs. Ass'n v. N.Y. Dept. of Envtl. Conservation*79 F.3d 1298, 1305 (2d Cir. 1996) ("The ripeness doctrine prevents courts, 'through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies. . . .'") (quoting *Abbott Labs.*, 387 U.S. at 148-49). Indeed, the State has conceded that some questions of fact are relevant to Count I when it stated in its brief that "with regard to the first factor [of the ripeness test], the State's two primary claims are *almost* entirely legal in nature." State's Opp'n to the Sec.'s Mot. to Dismiss [doc. # 25] at 21 (emphasis added). At the very least, knowing whether the State will have to spend its own money in order to comply with the requirements imposed by the Act will determine whether a court even needs to decide the statutory question posed in Count I. For if, as the Secretary asserts, the State can satisfy the testing requirements of the Act in a manner that is fully funded by the federal Government, there would be no need for a court to decide which party has correctly construed the Unfunded Mandates Provision.

Furthermore, having some concrete action by the Secretary to review can only enhance judicial decisionmaking regarding the important issues raised in this case. In *Air Espana v. Brien,* 165 F.3d 148 (2d

Cir. 1999), the Second Circuit noted that the "APA explicitly requires that an agency action be final before a claim is ripe for review." *Id.* at 152. The court went on to state that

> as a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process-it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.

165 F.3d at 152 (quoting *Top Choice Distribs., Inc.* v. U.S. Postal Serv., 138 F.3d 463, 466 (2d Cir. 1998). Here, insofar as Count I is concerned, no actions taken by the Secretary either mark the consummation of the agency's decisionmaking process or mark a point at which obligations have been determined or from which legal consequences will flow. Rather, in Count I, the State simply asks the Court to issue a general declaratory judgment not grounded in any concrete agency action, (unlike the claims in Counts III and IV, for example).[18] *See Motor Vehicle Mfrs*

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[18] In addressing the ripeness issue in the State's Opposition to the Secretary's Motion to Dismiss [doc. # 25], the State merges its four counts, citing the Secretary's denial of the State's waiver request as evidence of final agency action. *Id.* at 22. The Secretary's denials of waiver requests, however, are the focus of Count III of the Complaint, not Count I. Indeed, if the

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Ass'n, 79 F.3d at 1305 (the ripeness doctrine "'[protects] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'") (quoting *Abbott Labs.*, 387 U.S. at 148-49).

Even if the Court were to somehow construe the Secretary's statements regarding the Unfunded Mandates Provision as "final agency action," the Supreme Court's admonition in *National Park Hospitality Association*, 538 U.S. 803, 155 L. Ed. 2d 1017, 123 S. Ct. 2026, rings especially true in this case: There, the Supreme Court stated that "although the question presented here is 'a purely legal one' and . . . constitutes 'final agency action' . . . we nevertheless believe that further factual development would 'significantly advance our abilities to deal with the legal issues presented.'" *Id.* at 812. Because this Court strongly believes that "'consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to apply and/or enforce the regulation,'" *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 225 (2d Cir. 1998) (quoting *Gardner v. Toilet Goods Assoc.*, 387 U.S. 167, 171, 87 S. Ct. 1526, 18 L. Ed. 2d 704 (1967)), the Court concludes that Count I does not satisfy the fitness element of the prudential ripeness test.

State is correct in its interpretation of the Act, it has no need for a waiver.

Regarding the hardship prong of the prudential ripeness test, the Second Circuit teaches that in "assessing the possible hardship to the parties resulting from withholding judicial resolution, [a court] ask[s] whether the challenged action creates a direct and immediate dilemma for the parties. . . . *The mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship.*" *Simmonds*, 326 F.3d at 360 (emphasis added). The State remains in compliance with the Act and therefore faces no imminent enforcement action by the Secretary. Moreover, it is not certain what enforcement action, if any, the Secretary would ultimately take, assuming the Secretary were ever to find the State not in compliance. Finally, as noted previously, according to the Secretary, the State may maintain its compliance with the Act and at the same time pursue its interpretation of the Act in the context of a denial of a plan amendment. *See Seafarers Int'l Union of N. Am., AFL-CIO v. U.S. Coast Guard*, 736 F.2d 19, 28 (2d Cir. 1984) (finding no particular hardship under ripeness analysis because there were alternative avenues for administrative review). As a result, the State cannot satisfy the hardship prong of the prudential ripeness doctrine.

Therefore, even if the Court were wrong in its conclusion regarding the availability of pre-enforcement review under the Act, the Court would nonetheless dismiss Count I under the doctrine of prudential ripeness. Accordingly, the Court grants the Secretary Motion to Dismiss [doc. # 18] as to Count I

under Rule 12(b)(1) for lack of subject matter jurisdiction.

B. Count II – Spending Clause and Tenth Amendment

In Count II, the State asserts that the Secretary's interpretation and implementation of the Act violate both the Spending Clause and the Tenth Amendment of the U.S. Constitution. It will aid the analysis to describe in greater detail the State's constitutional claims.

Through its powers under the Spending Clause of the Constitution, *see* U.S. Const. art. I, § 8, Congress may "attach conditions on the receipt of federal funds" provided to the State so long as: (1) the exercise of the spending power is in pursuit of the "general welfare;" (2) the conditions on funding are laid out "unambiguously . . . enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation;" (3) the conditions are not "unrelated to the federal interest in particular national projects or programs;" and (4) the Spending Clause power is not "used to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 206-08. In a recent decision, the Supreme Court reiterated the requirement that any funding condition enacted under Congress's spending power must be "set out 'unambiguously.'" *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459, 165 L. Ed. 2d 526

(2006) (citing *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981)). Noting that "legislation enacted pursuant to the spending power is much in the nature of a contract," the Supreme Court stated that "recipients of federal funds must accept them voluntarily and knowingly." *Id.* (internal quotations omitted). Moreover, the Supreme Court, in considering whether the funding conditions were ambiguous, stated that it must view the conditions "from the perspective of a state official. . . ." *Id.*

In Count II, the State asserts that it accepted federal funding under the Act on the express understanding that the Unfunded Mandates Provision would ensure that all of the costs of complying with the Act's "mandates" would be paid for by the federal Government. According to the State, the Secretary's interpretation of the Unfunded Mandates Provision has "chang[ed] one of the conditions pursuant to which States accepted funding under the [the Act] . . . thereby precluding the State from exercising its choice to participate in the . . . Act knowingly, cognizant of the consequences of its participation." Compl. [doc. # 81] P191.

Unlike its Spending Clause claim, the State's theory of constitutional violation under the Tenth Amendment focuses not on the Unfunded Mandates Provision, but rather on potential penalties that the State would face should the Secretary find it not in compliance with the Act. In *Dole*, the Supreme Court, in *dicta*, revived a proposition from a 1937 case,

Steward Machine Co. v. Davis, 301 U.S. 548, 590, 57 S. Ct. 883, 81 L. Ed. 1279, 1937-1 C.B. 444, that "in some circumstances[,] the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." *Dole*, 483 U.S. at 211.[19] In its Tenth Amendment claim, the State asserts that if it does not comply with the testing requirements of the Act, the Secretary has the authority to withhold all of its Title I funding, as well as large amounts of funding for other "unrelated" programs-including drug-free schools, after-school programs and literacy for parents. Such action could amount to hundreds of millions of dollars, or up to 5% of overall education spending in the State and as much as 15% of spending in the most disadvantaged school districts. Compl. [doc. # 81] P64. These penalties, the State asserts, are "so harsh and unrelated to the conditions upon which the State

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[19] The circuits are split on the vitality and boundaries of the *Dole* coercion doctrine. The Ninth, Tenth, and D.C. Circuits have declined to attempt to police the boundary between coercion and encouragement. *See Kansas v. United States*, 214 F.3d 1196, 1201-02 (10th Cir. 2000); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *Oklahoma v. Schweiker*, 210 U.S. App. D.C. 288, 655 F.2d 401, 414 (D.C. Cir. 1981). The First, Third, Fourth, Fifth, and Eighth Circuits, however, have been reluctant to dismiss coercion claims out of hand. *See Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 278-79 (5th Cir. 2005); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128-29 (1st Cir. 2003); *A.W. v. Jersey City Pub. Schools*, 341 F.3d 234, 241 (3d Cir. 2003); *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000); *Virginia Dept. of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir.1997).

accepted the funds that they violate the Tenth Amendment." Id. P192.

As should be apparent from the foregoing discussion, Counts I and II are a pair. In both, the State seeks a pre-enforcement declaratory ruling from the Court that the Secretary is wrong; Count I alleges that her interpretation of the Act violates the statute itself, while Count II claims that if her interpretation of the Act is correct, the Act, as so interpreted, violates the Constitution. In accordance with its discussion of Count I, the Court concludes that *Thunder Basin* also applies to Count II and precludes a pre-enforcement constitutional challenge to the Secretary's interpretation of the Act. In this regard, the Court notes that the presence of constitutional questions, which an administrative agency has no particular expertise to resolve, does not diminish the application of *Thunder Basin* to this case. For, as in this case, the mine operator in *Thunder Basin* also challenged the agency's interpretation on constitutional (as well as statutory) grounds. Yet the Supreme Court had little difficulty concluding that because the mine operator's constitutional claims could (like its statutory claims) be "meaningfully addressed" by the court of appeals, there was no reason to excuse the failure to comply with the enforcement scheme provided by the Mine Act. *See Thunder Basin*, 510 U.S. at 215; *Doe*, 432 F.3d at 1263; *Nat'l Taxpayers Union*, 376 F.3d at 242; *E. Bridge, LLC*, 320 F.3d at 91.

Moreover, as was true of its statutory claims, the State's constitutional claims are not "wholly collateral" to the Act's enforcement scheme. *See Thunder Basin*, 510 U.S. at 212. The State's Spending Clause argument is tied directly to the Secretary's interpretation of the Act. For if the Secretary and State agreed on the Act's obligations, there would be no Spending Clause claim. Thus, the Court must carefully analyze both the Secretary's and State's interpretation of the Act, and compare those interpretations to the statutory language of the Act, in order to determine the validity of the State's Spending Clause argument. Because resolution of the State's Spending Clause claim requires a particularized analysis of the language and implementation of the Act, the claim is not wholly collateral to the enforcement scheme provided by Congress. *See Gen. Elec. Co. v. EPA*, 360 U.S. App. D.C. 275, 360 F.3d 188, 192 (D.C. Cir. 2004) (noting difference between "systemic and particularized challenges" to agency action in considering whether federal jurisdiction exists); *cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-98, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991) (holding that the federal district court had jurisdiction over an action in which respondents alleged that an agency had engaged in a pattern and practice of due process violations).

It should be readily apparent that the State's Tenth Amendment claim is also not wholly collateral to the Act's enforcement scheme; to the contrary, the State's claim is wholly *dependent* on that mechanism.

GEPA provides the Secretary with broad discretion to impose penalties of widely varying magnitudes. *See* 20 U.S.C. § 6311(g)(2) (authorizing the Secretary to "withhold funds for State administration . . . until the Secretary determines that the State has fulfilled those requirements"); 20 U.S.C. § 1234d(a) (authorizing the Secretary to "withhold from a recipient, *in whole or in part*, further payments (including payments for administrative costs)") (emphasis added). And because Connecticut remains in compliance with the Act, the Secretary has had no occasion to withhold, or even threaten to withhold, funds. Thus, the record does not reveal the size of the penalty that the State might face should it become non-compliant.[20] If, for example, the Secretary decided to withhold only a nominal amount from the State, there could be no serious claim under the Tenth Amendment. As the Fourth Circuit explained in *West Virginia v. U.S. Department of Health and Human Services*, 289 F.3d 281 (4th Cir. 2002), the Secretary's authority to craft a penalty that is proportionate to the non-compliance

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[20] Neither party appears to dispute the maximum amount that may be withheld by the Secretary under GEPA. *See* Compl. [doc. # 81] 67; Reply in Supp. of Def.'s Mot. to Dismiss [doc. # 28] at 17 ("The Secretary does not contest the State's description of the federal 'inducements' and 'conditions' at issue here. . . ."). While the maximum amount may not be in dispute, the Secretary certainly has the discretion to withhold less, *see, e.g.*, Def.'s Mem. Regarding Issues Raised at Apr. 28, 2006 Conf. [doc. # 65] at 16-17 (offering "not to suspend program funds pending the administrative hearing"). Therefore, any potential amount to be withheld is purely hypothetical at this point.

dooms any facial challenge to an agency's penalty powers. Here, as in *West Virginia*, "while it is certainly possible that, in a given case, the sanction actually imposed by the Secretary might not be proportionate to the breach and might be constitutionally suspect, the mere possibility of a constitutional violation is insufficient to sustain a facial challenge to a statute." *Id.* at 292-293; *see also United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); *Murphy*, 402 F.3d at 354 (stating that courts should "ensure[ ] that all non-constitutional avenues of resolution have been explored first, perhaps obviating the need for judicial entanglement in these constitutional disputes").

Therefore, in accordance with *Thunder Basin*, the Court concludes that it lacks subject matter jurisdiction over the State's claims in Count II. Moreover, as was true of Count I, even if the Court were wrong in this regard, the Court would nonetheless dismiss the State's claims in Count II on the basis of the prudential ripeness doctrine. *See supra* Subsection IV.A.3. The Court believes that the development of an administrative record would greatly benefit the Court in reaching its decision, even on the constitutional issues. As the Second Circuit has observed, "prudential ripeness is . . . a tool that courts may use

to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Simmonds*, 326 F.3d at 357. Accordingly, the Court GRANTS the Secretary's Motion to Dismiss [doc. # 18] as to Count II for lack of subject matter jurisdiction.

C. Count III – Denial of Waivers and Abdication

In Count III, the State challenges the Secretary's denial of the State's request for waivers pursuant to 20 U.S.C. § 7861. The State's challenge rests on two grounds. First, the State alleges that the Secretary's denial of the waivers was arbitrary and capricious under the APA. Compl. [doc. # 81] PP196, 199. Second, the State alleges that the Secretary abdicated her statutory responsibilities to "meaningfully consider" state waiver requests by announcing a policy of flatly refusing to consider any waivers that sought approval of alternative-grade formative testing. *Id.* P198. The State's abdication claim is limited to the Secretary's alleged policy with regard to alternative-grade formative testing. *Id.*

In her Motion to Dismiss [doc. # 18], the Secretary counters that her decision to deny the State's waiver requests is a decision "committed to the agency" and therefore not reviewable by the Court. *See* Mem. in Supp. of Def.'s Mot. to Dismiss [doc. # 18]

at 51-55. In addition, the Secretary responds to the State's abdication of statutory responsibilities claim by stating that she did not fail to "meaningfully consider" the State's waiver requests on alternative-grade formative testing, *see* Def.'s Mem. Regarding Am. Compl. [doc. # 50] at 18-24. The Court agrees with each of the Secretary's arguments.

1. Denial of Waivers

The State first claims that the Secretary acted arbitrarily and capriciously in denying the State's waiver requests in violation of 5 U.S.C. § 706(2). The APA permits judicial review for "[a] person suffering legal wrong because of agency action," *id.* § 702, but the statute explicitly excludes review "to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law," *id.* § 701(a). It is the second exclusion that is pertinent to this case. In *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985), the Supreme Court explained that even "where Congress has not affirmatively precluded review" under § 701(a)(1), § 701(a)(2) precludes review "if the statute [governing the agency's actions] is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 830. The committed-to-agency-discretion exception is a "'very narrow exception' to the general grant of jurisdiction [and] is 'applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.'"

Christianson v. Hauptman, 991 F.2d 59, 62 (2d Cir. 1993) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)).

The Court is acutely aware that no clear standard exists to determine what statutory language is sufficient to find that a decision is committed to agency discretion. *See* Charles H. Koch, Jr., *Administrative Law and Practice*, § 13.3[1] (2d ed. 1997) ("It is unclear how compelling the potential standards must be in order to preclude review and some soft language has been considered insufficient to support review."). Nevertheless, drawing what guidance it can glean from decisional law, the Court concludes that the language of the provision governing waivers grants the Secretary broad discretion to deny states' waiver requests and does not provide any standard – let alone a meaningful one – that a court could use to assess the Secretary's denial of a particular waiver request.[21]

Section 7861 of the Act reads in pertinent part as follows: "[T]he Secretary may waive any statutory or regulatory requirement of this chapter." 20 U.S.C.

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[21] The Court has no occasion in this case to decide whether the Secretary's *grant* of a waiver request would be judicially reviewable. *See Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994) (reviewing grant of a waiver for compliance with statutory standards). Therefore, nothing in this decision should be construed as providing a view one way or the other on that question.

§ 7861(a). The statute provides no further guidelines or guidance for the Secretary in deciding whether to deny a waiver request. The statute does include specific guidelines as to what information a waiver request must include. Requests must describe "for each school year, specific, measurable educational goals . . . that would be affected by the waiver and the methods to be used to measure annually such progress for meeting such goals." 20 U.S.C. § 7861(b)(1)(C). The Act, however, does not require the Secretary to grant a waiver if these minimum elements are included in a request. It seems clear, therefore, that Congress intended the Secretary to have broad and unfettered discretion to decide that a state should not be relieved of its obligations to comply with the statutory requirements imposed by Congress.

The Court's conclusion that the Act contains no standard governing the denial of a waiver request is fortified by other portions of the Act's waiver section that provide specific limitations on and guidance regarding the Secretary's ability to *grant*, *extend or terminate* waivers. The statute explicitly prevents the Secretary from granting requests to waive a number of the Act's requirements. *See id.* § 7861(c). The Act also allows the Secretary to grant a waiver *extension* only if the Secretary "determines that-(A) the waiver has been effective . . . and the waiver has contributed to improved student achievement; and (B) the extension is in the public interest." *Id.* § 7861(d)(2). Furthermore, the Act requires the Secretary to report to

Congress, "summarizing the use of waivers" and "describing whether the waivers – (i) increased the quality of instruction to students; or (ii) improved the academic achievement of students." *Id.* § 7861(e)(4)(A)-(B). And most significantly, the Act allows the Secretary to *terminate* a waiver only if the "Secretary determines, after notice and an opportunity for a hearing, that the performance of the State . . . has been inadequate to justify a continuation of the waiver or if the waiver is no longer necessary to achieve its original purpose." *Id.* § 7861(f). Clearly, therefore, Congress knew how to cabin the Secretary's discretion in reviewing waiver requests when it wished to do so. Yet, the statute provides no restrictions on or guidance regarding the *denial* of waivers.

The House Report on the Act's waiver provisions states that "the Secretary's waiver authority is generally consistent with the waiver authority granted to States under the Education Flexibility and Partnership Act ['EFPA']." *See* H.R. Rep. 107-63 at 368 (2001). The EFPA waiver provision in turn provides, in part, as follows:

> The Secretary may approve an application [for a waiver] . . . only if the Secretary determines that such application demonstrates substantial promise of assisting the State educational agency . . . in carrying out comprehensive educational reform, after considering . . . the ability of the [waiver] to ensure accountability . . . [and] the significance

> of the . . . statutory or regulatory requirements relating to education that will be waived.

20 U.S.C. § 5891b(a)(3)(B). Similar to the No Child Left Behind Act, the EFPA places conditions only on the granting of waivers, not on their denial.

"Where the language of the statute is not in itself sufficient evidence of whether Congress intended to grant unreviewable discretion, the court will look to other indications of congressional intent[,] [including] the nature of the agency action involved. . ." *N.Y. Racing Ass'n, Inc. v. N.L.R.B.*, 708 F.2d 46, 51 (2d Cir. 1983). Here, the State requests a waiver from three specific statutory requirements in the Act. By denying the State's waiver requests, the Secretary has merely decided that Connecticut must continue to comply with these requirements, like every other state. That is, when the Secretary denies a waiver request, the default is merely compliance with the Act. It seems eminently sensible that Congress would have wanted to restrict the ability of the Secretary to release states from their statutory obligations, but would not have wanted to place any restrictions on the Secretary's right to insist on state compliance with the directives Congress itself imposed in the Act. It is also doubtful in the extreme that Congress would have wanted or expected a court battle every time the Secretary merely decided that a state should continue to comply with the Act.

Case law also supports the Court's conclusion that the Secretary's decision to deny a waiver request is committed to agency discretion and thus not reviewable. For example, the Second Circuit has on a number of occasions held, or cited with approval another circuit's holding, that there is no judicial review in circumstances that are similar to that presented by the Secretary's denial of waiver requests under the Act:

> * A statute vested the decisionmaker with authority to make all substantive and procedural rules for resolving claims under the September 11 Victim Compensation Fund. *Schneider v. Feinberg*, 345 F.3d 135, 149 (2d Cir. 2003).
>
> * A statute authorized the Director of the United States Information Agency to make a recommendation to the Attorney General to waive the requirement that a J-1 visa holder return to his or her home country before applying for permanent residence in the U.S. upon a finding that such return would "impose exceptional hardship upon the alien's [U.S. citizen or resident] spouse or child." *Dina v. Att'y Gen. of U.S.*, 793 F.2d 473, 476 (2d Cir. 1986).
>
> * A statute simply instructed an agency official to reconsider any program vetoed by the Governor and assess whether the program was "fully consistent with the provisions and in furtherance of the purposes of the statute." *East Oakland-Fruitvale Planning*

Council v. Rumsfeld, 471 F.2d 524, 528, 533 (9th Cir. 1972), *cited with approval in Greater N.Y. Hosp. Ass'n v. Mathews*, 536 F.2d 494, 498 (2d Cir. 1976).

* A statute stated only that "each provider of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly)." *Mathews*, 536 F.2d at 497 (internal quotation omitted).

* A statute granting the National Labor Relations Board authority to regulate industries involved in interstate commerce but also providing the agency the discretion to decline jurisdiction if "the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." *N.Y. Racing Ass'n Inc.*, 708 F.2d at 51 (citing 29 U.S.C. § 164(c)).

To support its argument that the Secretary's denial of a waiver request is reviewable, the State principally relies upon the Second Circuit's holding in *Christianson*, 991 F.2d 59.[22] In *Christianson*,

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[22] The State also cites *Dickson v. Sec'y of Defense*, 314 U.S. App. D.C. 345, 68 F.3d 1396 (1995). There, the D.C. Circuit held that a statute providing that the Secretary of a military department "may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice" was reviewable and not committed to agency discretion. However, the court relied on the "interest of justice" standard included within the statute to guide its review of the Secretary's action. *See id.* at 1403-04. As noted above, the portion of the Act dealing with

(Continued on following page)

Congress created the Fire Island National Seashore ("Fire Island") and authorized the National Park Service (the "Park Service") to manage it, instructing the Secretary of the Interior to "administer and protect the Fire Island National Seashore with the *primary* aim of conserving the natural resources located there.'" *Id.* at 63 (citing 16 U.S.C. § 459e-6(a)). The Park Service then promulgated a rule prohibiting use of planes on Fire Island, but certain communities on the island were exempted from that prohibition. Years later, allegedly at the behest of the citizens of one of the exempted communities, the Park Service conducted a notice and comment rulemaking to remove the community's exemption. *Id.* at 61. A resident who opposed the removal of the exemption asked for a reconsideration, which was denied by the Park Service. The resident later challenged the removal of the exemption and the Park Service's refusal to reconsider in court. *Id.* The Second Circuit held that the agency's action in removing the exemption could be reviewed under the APA in accordance with the language in the Fire Island statute. *Id.* at 62-63.

Christianson is distinguishable from this case on several grounds. In *Christianson*, the agency promulgated a rule under its general agency authority to remove an exemption; it did not act pursuant to any

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denial of waivers contains no such standard and therefore is distinguishable from the statute in *Dickson*.

specifically granted authority by Congress. *Id.* at 61-62. Here, by contrast, Congress specifically vested the Secretary with the authority to waive requirements of the Act, limiting her exercise of discretion to grant waivers but leaving completely unfettered the Secretary's discretion to deny a waiver. Relatedly, the waiver request in *Christianson* involved a request for a reprieve from a prior agency regulation; here, by contrast, the State seeks relief from a specific statutory requirement.

The Second Circuit in *Christianson* also seemed especially troubled by the fact that, if the court "were to accept the [Park] Service's argument, we would be unable to judicially review such actions. In our society, judicial review provides an important escape route from bureaucracy's iron cage." *Id.* at 63. Here, other avenues exist for the State's claims to be heard, even if the Secretary's denial of waivers is unreviewable. For example, GEPA provides for judicial review in the context of an enforcement action. Also, the Secretary has acknowledged that her denial of a plan amendment is reviewable under the APA because there are statutory standards a court can apply in reviewing such a decision. *See* Def.'s Mem. Regarding Issues Raised at Apr. 28, 2006 Conf. [doc. # 65] at 17 (citing 20 U.S.C. § 6311(e)(1)(F) (stating that the Secretary shall "have the authority to disapprove a State plan for not meeting the requirements of this part")).

Finally, while the Court acknowledges that *Christianson* could be read as expansively as the State seeks to read it, it is notable that no court has

ever cited *Christianson* for such an expansive interpretation of the committed to agency discretion exception in the APA.[23]

To construct a standard by which a court could meaningfully review the Secretary's decision to deny a waiver of the Act's requirements, the Court would be required to rewrite the waiver provision of the Act for Congress and guess at the precise contours of such a standard. Would it be unlawful to deny a waiver if a state could prove that its request would better educate its students? Or, would it be unlawful to deny a

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[23] The State also relies on the holdings in two district court cases where the courts found agency decisions to be reviewable. *See* State's Supplemental Br. in Supp. of Def.'s Mot. to Dismiss on Matters Raised During the Apr. 28, 2006 Oral Argument [doc. # 64] at 15 (citing *George Campbell Painting Corp. v. Chao*, 2006 U.S. Dist. LEXIS 3318, No. 3-05-CV-00716(JCH), 2006 U.S. Dist. LEXIS 3318, 2006 WL 197375 (D. Conn. Jan. 25, 2006); *M&T Mortg. Corp. v. White*, 2006 U.S. Dist. LEXIS 1903, No. 04CV4775NGGVVP, 2006 WL 47467 (E.D.N.Y. Jan. 9, 2006)). These cases are also distinguishable. In *George Campbell Painting Corp.*, the court noted that the Department of Labor must consider numerous, specific factors in determining whether laborers were underpaid, thereby allowing the court to review whether the agency properly considered those factors. *See George Campbell Painting Corp.*, 2006 U.S. Dist. LEXIS 3318, 2006 WL 197375, at *5. Here, as noted above, no such factors exist for denials of waivers. In *M&T Mortg. Corp.*, the court used a broad statutory standard to review whether HUD improperly endorsed a mortgage lender. *See M&T Mortg. Corp.*, 2006 U.S. Dist. LEXIS 1903, 2006 WL 47467, at *7-*10. However, the type of agency action in *M&T* is markedly different from the Secretary's decision to deny a waiver from a specific statutory requirement.

waiver so long as a state could show that its request would not inflict harm and might, if tried, do some good? Or, would it be unlawful to deny a waiver if the state could show its request would be equally effective but less costly, thereby allowing scarce resources to be spent on other educational programs? The Court could go on and on. The point is that there is no reason why this Court should create standards governing the Secretary's denial of a waiver that Congress itself chose not to impose. As the Second Circuit reiterated in *Lunney v. United States*, 319 F.3d 550 (2d Cir. 2003), "'the danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress, and [a court must] . . . determine whether in this case Congress has provided [it] with law to apply.'" *Id.* at 558 (quoting *Chaney*, 470 U.S. at 834 (internal quotations omitted)). In this case, Congress has provided no law to apply when the Secretary denies a waiver. Accordingly, the Secretary's denial of waiver requests is not reviewable by the Court under 5 U.S.C. § 701(a)(2).

2. Abdication of Statutory Responsibilities

The State also alleges that the Secretary abdicated her statutory responsibilities by adopting a policy of flatly refusing even to consider waiver requests pertaining to alternative-grade formative testing. Compl. [doc. # 81] 198. The abdication of statutory

responsibilities theory was first mentioned in *Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714. There, the Supreme Court held that the Federal Drug Administration's refusal to institute enforcement proceedings was not subject to judicial review under 5 U.S.C. § 701(a)(2), since that agency's decision was "committed to agency discretion by law" and the statute in question did not provide guidelines for the agency to follow in exercising that discretion. *Id.* at 832-33. In a footnote, however, the Supreme Court made the following remark:

> We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it justifiably could be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. *See, e.g., Adams v. Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."

Id. at 833 n.4. The Supreme Court has never revisited this issue in over twenty years. It is this footnote that is the source of the State's claim to judicial review in this case.

Recently, in *Riverkeeper, Inc. v. Collins*, 359 F.3d 156 (2d Cir. 2004), the Second Circuit had occasion to consider this footnote from *Chaney*. In *Riverkeeper*, the plaintiff did not dispute that the agency's decision was committed to agency discretion by law, but instead invoked the *Chaney* footnote and argued that the court nonetheless had jurisdiction to review the agency's decision because the agency had consciously and expressly adopted a policy so extreme as to amount to an abdication of statutory responsibilities. At the outset, the Second Circuit observed that "no party has directed us to, nor can we locate, a decision by a court of appeals that has found, in performing the *Chaney* analysis, a federal agency to have abdicated its statutory responsibilities." *Id.* at 170 n.17. That is the case here as well; the State has not cited a single decision in which a court utilized the *Chaney* footnote to strike down an agency action that was otherwise committed to its discretion by law.

Riverkeeper went on to state that "even if we assume that the *Chaney* Court established by way of footnote 4 federal jurisdiction over appeals from agency action" in cases involving abdication of statutory responsibilities, there was no abdication in that case. *Riverkeeper, Inc.*, 359 F.3d at 170. The court's analysis in *Riverkeeper* provides valuable guidance for this case. The plaintiffs in *Riverkeeper* alleged that the agency had failed to enforce a condition of licensing and by doing so, had abdicated an express statutory requirement to ensure that licensed activities would adequately protect public health and

safety. In assessing that claim, the Second Circuit held that the agency "can be viewed as abdicating its statutory duties . . . only if it has established a policy not to protect adequately public health and safety. . . ." *Id.* at 168. Put another way, only if a plaintiff could show that an agency had "indisputable proof" that the general purpose of the relevant statute was not being met "and nonetheless decided it would do nothing to address the situation, [the plaintiff] might then plausibly charge that [the agency] had 'abdicated' its statutory responsibility." *Id.* at 168. In a footnote accompanying that text, the Second Circuit cited with favor the following statement from the Fifth Circuit: "'Real or perceived inadequate enforcement of [the] laws does not constitute a reviewable abdication of duty.'" *Id.* at 168 n.15 (quoting *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997)). Because the plaintiff in *Riverkeeper* could not satisfy the understandably high standard established by the Second Circuit, the court affirmed the dismissal of the plaintiff's claim for lack of jurisdiction.

The State's allegations in this case fare no better than those in *Riverkeeper*. The overall purpose of the Act is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments." 20 U.S.C. § 6301. In its Complaint, the State alleges that the Secretary "has made numerous public statements that testing in every grade (for grades 3 through 8) is one of the

'bright lines' and the 'linchpin' of the . . . Act, and indicated that requests to waive the requirement would not even be considered." Compl. [doc. # 81] P132. But there is no allegation that the Secretary possesses "indisputable proof" that a failure to allow alternative-grade formative testing will deny children a fair, equal, and significant opportunity to obtain a high-quality education.

To be sure, the Secretary and the State disagree about how best to implement the goals of the Act. But that policy disagreement can hardly be labeled an abdication of the Secretary's responsibilities. As *Riverkeeper* recognized, "were it otherwise, we would be reading the *Chaney* footnote to have created jurisdiction on an 'abdication' basis every time an administrative agency declines to order demanded action on an asserted discrete, perceived problem within its area of statutory responsibility." 359 F.3d at 170. Nor can the State plausibly claim that the Secretary did not even consider the State's waiver requests. The correspondence between the Secretary and the State that is referenced in the State's Complaint shows that the State and Secretary had a number of discussions about the basis of the State's request and the Secretary's rationale in rejecting it. Compl. [doc. # 81] PP105, 120, 126, 133, 143, 145, 147, 149, 151. Once again, a quote from *Riverkeeper* aptly captures the situation here:

> The *Chaney* Court made clear the strict limitations on the judicial power to review administrative agency decisions. We are

> confident that in thus shutting the front door to the federal courts, it did not mean to open a back door permitting federal courts to assert jurisdiction whenever a specific problem is brought to an agency's attention and the agency decides not to order demanded curative steps with respect to it. Such an exception . . . would threaten to devour the rule.

Riverkeeper, 359 F.3d at 169.

Accordingly, the Court grants the Secretary's Motion to Dismiss [doc. # 18] Count III for lack of subject matter jurisdiction.

D. Count IV – Denials of Plan Amendments

The State added Count IV to its Complaint in its most recent filing. Compl. [doc. # 81] PP200-206. Count IV also asserts an APA claim. It alleges that the Secretary acted arbitrarily and capriciously in denying the State's request for plan amendments and that she violated 20 U.S.C. § 6311(e)(1)(E) when she failed to provide an adequate hearing prior to rejecting the State's proffered plan amendments. Both parties agree that the State filed a plan amendment regarding the testing of ELL students, *see* Compl. [doc. # 81] PP147, 148; Def.'s Mem. Regarding the State's Second Am. Compl. [doc. # 83] at 2-3, and the State never filed a plan amendment regarding formative testing in alternate years, *see* Compl. [doc. # 81] PP147, 148. There may be some dispute between the parties on whether the State has submitted a plan amendment with respect to special education

students, but the Court sees no need to resolve that dispute at this time. *See* Compl. [doc. # 81] PP148, 151; Def.'s Mem. Regarding the State's Second Am. Compl. [doc. # 83] at 2-3.[24]

Unlike the other counts of the Complaint, the Secretary does not contend that this Court lacks subject matter jurisdiction over the claims asserted in Count IV. *See id.* [doc. # 83] at 2-3. Instead, the Secretary asks the Court at this very preliminary stage of the case to reject the State's claim as a matter of law on the face of the State's Complaint. According to the Secretary, she was bound as a matter of law to reject the State's plan amendments. *See id.* [doc. # 83] at 16-18. Needless to say, the State vigorously disputes the Secretary's arguments on the merits.

As should be apparent, the Court is not in any position to reach any decision on the validity of the claims asserted in Count IV until the Court conducts a detailed analysis of the plan amendments in question, the requirements of the Act regarding plan amendments, and the Secretary's reasons for

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[24] The Secretary has previously misidentified waiver requests as plan amendments, *see* Compl. [doc. # 81] PP147, 148, 151, and asserted that waiver requests "will be considered according to the process we have established for amendments to accountability plans." Letter from Secretary Spellings to Commissioner Sternberg (May 3, 2005) at 3. Therefore, as Count IV proceeds forward, the parties will have to clarify the precise scope of the state plan amendments that are properly at issue in Count IV.

rejecting the State's plan amendments. That will require, at a minimum, a compilation of the administrative record, since the State's claim in Count IV is an administrative appeal from the Secretary's denial of the plan amendments and therefore the Court's review is confined to the administrative record. *See Riverkeeper*, 359 F.3d at 184. It would certainly be premature to rule on the merits of the State's administrative appeal before the parties themselves have compiled and filed the relevant administrative record.

The Court, therefore, cannot and will not dismiss the State's administrative appeal from the Secretary's denial of the State's plan amendments. The Court emphasizes, however, that it has not as yet made any determination of the precise issues that are properly before it on the State's appeal of the denial of its plan amendments. Thus, nothing in this decision should be construed as determining (one way or the other) whether the State's arguments regarding the Unfunded Mandates Provision and the Constitution are properly before the Court on Count IV. The Court will make that determination only after reviewing the administrative record on the State's plan amendment appeal.

That leaves the State's assertion in Count IV that it was denied a hearing on its proposed plan amendments in violation of 20 U.S.C. § 6311(e)(1)(E).[25] In its

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[25] Section 6311(e)(1)(E) states that the Secretary shall "not decline to approve a State's plan before-(i) offering the State an

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Complaint, the State requests a declaratory judgment requiring the Secretary to "provide a hearing before she denies a plan amendment." *See* Compl. [doc. # 81] at 47. If the Secretary did in fact violate the Act by not providing the State with a hearing, the proper remedy would be a remand for the Secretary to hold a hearing. *See Fl. Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985) ("If the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); 33 Charles Alan Wright & Charles H. Koch, Jr., Federal Practice and Procedure § 8313 (2006) ("If a court finds that the agency's procedures are inadequate, it should remand so that the agency may correct its procedures rather than invalidate the substantive decision."). However, in other portions of its Complaint and in its briefing to the Court, the State has made it clear that it does not want the Court to remand the case to the agency for the hearing requested, but rather asks the Court to rule on the merits of the plan amendments. *Id.* at 46-48; State's Supplemental Br. in Supp. of Def.'s Mot. to Dismiss on Matters Raised During the Apr. 28, 2006 Oral Argument [doc. # 64] at 13-14 (arguing

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opportunity to revise its plan; (ii) providing technical assistance in order to assist the State to meet the requirements of [the] subsections . . . of this section; and (iii) providing a hearing; . . ." 20 U.S.C. § 6311(e)(1)(E).

that pursuing the plan amendment process would be futile).

Given that (1) the State does not seek a remand for the hearing to which it believes it is entitled; (2) the Secretary does not seek a remand; and (3) there are apparently no other plan amendments pending before the Secretary, the Court dismisses the State's claim for violation of § 6311(e)(1)(E) as moot. The Court emphasizes that in doing so, it does not reach the question of what would constitute a satisfactory hearing under § 6311(e)(1)(E). That determination is not necessary in this case. The Court therefore denies in part and grants in part the Secretary's Motion to Dismiss [doc. # 18] as to Count IV. The Court denies the Motion to Dismiss with respect to the State's claim that the Secretary's denial of its plan amendment violated the APA. The Court grants the Motion to Dismiss as to the State's claim that the Secretary provided an inadequate hearing because that claim is now moot.

V.

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART the Secretary's Motion to Dismiss [doc. # 18]. The Motion to Dismiss is GRANTED as to Count I, Count II, and Count III in their entirety, as the Court concludes that it lacks subject matter jurisdiction over those claims. The motion is also GRANTED as to the portion of Count IV that alleges that the Secretary failed to provide

the hearing required by the Act, as the Court concludes that this claim is moot. The Motion to Dismiss is DENIED as to the remaining claims in Count IV.

As a result of this ruling, Count IV is the only remaining count of the State's Complaint. The parties shall file no later than **October 16, 2006**, a joint report setting forth their proposed schedule(s) for filing the administrative record and for resolving the remaining claims in this action. Having now determined what claims are before it, the Court orders that any non-party wishing to intervene on the issues in Count IV must file a motion to intervene and supporting papers no later than **October 16, 2006**.

IT IS SO ORDERED.

/s/ Mark R. Kravitz United States District Judge

Dated at New Haven, Connecticut: September 27, 2006.

Conn. Gen. Stat. § 10-14n (2006)

§ 10-14n. State-wide mastery examination. Certification of mastery. Limitations on use of test results. Examination in accordance with federal No Child Left Behind Act; funding. Kindergarten assessment tool.

(a)(1) Each student enrolled in the fourth grade in any public school shall annually take a state-wide mastery examination. For purposes of this section, a state-wide mastery examination is defined as an examination which measures whether or not a student has mastered essential grade-level skills in reading, language arts and mathematics. The mastery examination shall be provided by and administered under the supervision of the State Board of Education.

(2) Each student enrolled in the sixth grade and each student enrolled in the eighth grade in any public school shall annually take a state-wide mastery examination. Such mastery examination shall be provided by and administered under the supervision of the State Board of Education.

(3) Annually each student enrolled in the tenth grade in any public school or any endowed or incorporated high school or academy approved by the State Board of Education pursuant to section 10-34 shall take a state-wide mastery examination. Such mastery examination shall be provided by and administered under the supervision of the State Board of Education.

(b) Beginning in the 2005-2006 school year, the state-wide mastery examinations pursuant to subsection (a) of this section shall be administered in March or April.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, the state-wide mastery examinations pursuant to this section shall be administered as follows:

(1) Beginning in the 2005-2006 school year, each student enrolled in grades three to eight, inclusive, and ten in any public school shall, annually, in March or April, take a state-wide mastery examination that measures the essential and grade-appropriate skills in reading, writing and mathematics; and

(2) Beginning in the 2007-2008 school year, each student enrolled in grades five, eight and ten in any public school shall, annually, in March or April, take a state-wide mastery examination in science.

(d) Mastery examinations pursuant to subsection (c) of this section shall be provided by and administered under the supervision of the State Board of Education.

(e) Student scores on each component of the state-wide tenth grade mastery examination may be included on the permanent record and transcript of each student who takes such examination provided, for a student who meets or exceeds the state-wide mastery goal level on any component of the state-wide

tenth grade mastery examination, certification of having met or exceeded such goal level shall be made on the permanent record and the transcript of each such student and such student shall be issued a certificate of mastery for such component. Each student who fails to meet the mastery goal level on each component of said mastery examination may annually take or retake each such component at its regular administration until such student scores at or above each such state-wide mastery goal level or such student graduates or reaches age twenty-one.

(f) No such public school or endowed or incorporated high school or academy may require achievement of a satisfactory score on the state-wide mastery examination, or any subsequent retest on a component of such examination as the sole criterion of promotion or graduation.

(g) On and after July 1, 2003, mastery testing pursuant to this section shall be in conformance with the testing requirements of the No Child Left Behind Act, P.L. 107-110 provided (1) any costs of such conformance to the state and local or regional boards of education that are attributable to additional federal requirements of the No Child Left Behind Act, P.L. 107-110 shall be paid exclusively from federal funds received by the state and local or regional boards of education pursuant to the No Child Left Behind Act, P.L. 107-110, and (2) the joint standing committee of the General Assembly having cognizance of matters relating to education shall, on or before February 1, 2004, evaluate the estimated additional cost to the

state and its local and regional boards of education for compliance with the requirements of the No Child Left Behind Act, P.L. 107-110, net of appropriated federal funds for such purpose, and the comparable amount of estimated federal funds to be received by the state and its local and regional boards of education pursuant to the No Child Left Behind Act, P.L. 107-110 and report its findings and recommendations, if any, pursuant to the provisions of section 11-4a.

(h) Within available appropriations, the Commissioner of Education shall, not later than October 1, 2009, develop and implement a state-wide developmentally appropriate kindergarten assessment tool that measures a child's level of preparedness for kindergarten.

No. 09-852

(Filed May 7, 2010)

In the Supreme Court of the United States

SCHOOL DISTRICT OF THE CITY OF PONTIAC, ET AL., PETITIONERS

v.

ARNE DUNCAN, SECRETARY OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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* * *

[10] derstanding of the statutory scheme to petitioners' factual circumstances. *Id.* at 126a.[3]

ARGUMENT

Petitioners renew their argument that the States lacked clear notice that if they accepted federal funds under Title I of NCLB, they would be required to comply with the statutory conditions even if compliance would require the expenditure of state or local funds. This is not a proper vehicle to review that proposition because this case does not present a properly justiciable controversy. In any event, petitioners' argument fails on its merits, and the decision below does not conflict with any decision of this Court or any other court of appeals. Indeed, no other court has decided this issue in the eight years since NCLB was first enacted, and the judgment of the court of appeals in this case – affirming the district court's judgment by an equally divided court – presumably would not be regarded as binding precedent even in the Sixth Circuit. Further review of the decision below is not warranted.

1. This case is not a proper vehicle to review the question presented because it does not present a properly justiciable controversy. Petitioners assert an abstract and sweeping challenge to NCLB, and they do so without the participation of their respective

[3] Judge Gibbons wrote separately, indicating that she would remand for further record development. Pet. App. 196a-201a.

States. There are simply "too many elephants in the room," Pet. App. 194a, to make this a suitable vehicle for review.

First, petitioners assert broadly that the costs of compliance "far exceed" the federal funding, ask for "an order declaring that states and school districts are not required to spend non-NCLB funds to comply with the

* * *

[13] own priorities and spending, then someone gets to decide whether a particular program or requirement is or becomes 'underfunded' and, if so, then the district need not spend any funds on that program or requirement." Pet. App. 189a. Whether or not the courts below should have dismissed this case on justiciability grounds, this Court should not address the meaning of important federal spending legislation at this level of abstraction without the participation of the responsible States and submission of concrete proposals for administrative review.

2. In any event, petitioners' argument fails on its merits, and the order affirming the judgment of dismissal does not conflict with any decision of this Court or any other court of appeals. Indeed, even though every State has accepted federal funds under NCLB on an annual basis since its passage in 2002,

no other court has decided the question presented.[4] Further review of the decision below is not warranted.

a. Petitioners' argument rests entirely on 20 U.S.C. 7907(a), which appears in Title IX of the Act and provides that "[n]othing in this [Act] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any

* * *

[20] Circuit. See *Stupak-Thrall v. United States*, 89 F.3d 1269, 1269 (6th Cir. 1996) (Moore, J., concurring in the order), cert. denied, 519 U.S. 1090 (1997); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 215 n.1 (1995); *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1869). Only one other case has raised this question, and it was dismissed by the district court on justiciability grounds. See *Connecticut v. Spellings*, 549 F. Supp. 2d 161 (D. Conn. 2008), appeal pending, No. 08-2437 (2d Cir. argued Sept. 17, 2009). And in

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[4] The State of Connecticut raised a similar claim, but the district court dismissed that claim as non-justiciable because the State failed to present the Spending Clause challenge to the Secretary in the context of a proposed amendment to the State plan. See *Connecticut v. Spellings*, 549 F. Supp. 2d 161, 179-180 (D. Conn. 2008). An appeal in that case is currently pending before the Second Circuit. See *Connecticut v. Duncan*, No. 08-2437 (argued Sept. 17, 2009).

the intervening eight years, all States have opted to participate in the federal program year after *year – after* learning of the federal funds allocated. This Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010